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In the
# Supreme Court of the United States

VLADAS ZAJANCKAUSKAS,
*Petitioner*,
v.
ERIC HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,
*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit*

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the court of appeals had jurisdiction to review an order of an immigration judge where the immigration judge denied discretionary relief on: (1) the erroneous legal conclusion that Petitioner personally participated in Nazi persecution; and (2) the erroneous conclusion that Petitioner's incredible testimony amounted to false testimony.

## TABLE OF CONTENTS

QUESTION PRESENTED . . . . . . . . . . . . . . . . . . . . i

TABLE OF CONTENTS . . . . . . . . . . . . . . . . . . . . ii

TABLE OF AUTHORITIES . . . . . . . . . . . . . . . . . . v

OPINIONS BELOW . . . . . . . . . . . . . . . . . . . . . . 1

STATEMENT OF JURISDICTION . . . . . . . . . . . . 1

STATUTORY PROVISIONS INVOLVED . . . . . . . 2

STATEMENT OF THE CASE . . . . . . . . . . . . . . . 3

A. Factual Background . . . . . . . . . . . . . . . . . . 3

B. Procedural Background . . . . . . . . . . . . . . . 5

1. Denaturalization Proceedings . . . . . . . . 5

2. Removal Proceedings . . . . . . . . . . . . . . . 7

REASONS FOR GRANTING THE PETITION . . 11

A. The court of appeals improperly dismissed the petition for review because the IJ's denial of discretionary relief was based on impermissible factors. . . . . . . . . . . . . . . . . 11

1. In denying discretionary relief, the IJ factored in his erroneous legal conclusion that Petitioner personally participated in Nazi persecution, a legal conclusion that

the court of appeals should have reviewed. . . . . . . . . . . . . . . . . . . . . . . . 12

2. The IJ's finding that Petitioner did not present credible testimony is not a proper basis for denying discretionary relief. . 18

CONCLUSION . . . . . . . . . . . . . . . . . . . . . . . . 20

APPENDIX

Appendix A: Opinion, United States Court of Appeals for the First Circuit (7/13/10) . . . . . . . . . . . . . . . . . 1a

Appendix B: Decision of the Board of Immigration Appeals, U.S. Department of Justice Executive Office for Immigration Review Board of Immigration Appeals (2/25/09) . . . . . . . . . . . . . . . . . 9a

Appendix C: Decision of the Immigration Judge, The United States Department of Justice Executive Office for Immigration Review, United States Immigration Court Boston, Massachusetts (8/4/07) . . . . . . . . . . . . . . . . . 14a

Appendix D: Memorandum of Decision/ Order, United States District Court District of Massachusetts (January 26, 2005) . . . . . . . . 96a

# TABLE OF AUTHORITIES

## Cases

*Alvarado v. Gonzales*,
449 F.3d 915 (9th Cir. 2006) . . . . . . . . . . . 12, 16

*Castaneda-Castillo v. Gonzalez*,
488 F.3d 17 (1st Cir. 2007) (en banc) . . . . 16, 17

*Chen v. U.S. Attorney Gen.*,
513 F.3d 1255 (11th Cir. 2008) . . . . . . . . . . . . 17

*Demjanjuk v. Petrovsky*,
10 F.3d 338 (6th Cir. 1993) . . . . . . . . . . . . . . . 20

*Fedorenko v. United States*,
449 U.S. 490 (1981) . . . . . . . . . . . . . . . 13, 15, 18

*Hammer v. INS*,
195 F.3d 836 (6th Cir. 1999) . . . . . . . . . . . . . . 15

*Hernandez v. Reno*,
258 F.3d 806 (8th Cir. 2001) . . . . . . . . . . . . . . 17

*Im v. Gonzales*,
497 F.3d 990 (9th Cir. 2007) . . . . . . . . . . . . . . 17

*Laipenieks v. INS*,
750 F.2d 1427 (9th Cir. 1985) . . . . . . . . . . 13, 14

*Matter of Tijam*,
22 I&N Dec. 408 (BIA 1998) . . . . . . . . . . . . . . 19

*Moore v. Chesapeake & O. R. Co.*,
340 U.S. 573 (1951) . . . . . . . . . . . . . . . . . . . . 19

*Negele v. Ashcroft*,
368 F.3d 981 (8th Cir. 2004) . . . . . . . . . . . 14, 15

*Petkiewytsch v. INS*,
945 F.2d 871 (6th Cir. 1991) . . . . . . . . . . . 14, 15

*Singh v. Gonzales*,
417 F.3d 736 (7th Cir. 2005) . . . . . . . . . . . . . . 17

*United States v. Breyer*,
41 F.3d 884 (3d Cir. 1994) . . . . . . . . . . . . . . . . 15

*United States v. Hansl*,
364 F. Supp. 2d 966 (D. Iowa 2005) . . . . . . . . 15

*United States v. Kairys*,
600 F. Supp. 1254 (N.D. Ill. 1984) . . . . . . . . . . . 6

*United States v. Kumpf*,
438 F.3d 785 (7th Cir. 2006) . . . . . . . . . . . . . . 15

*United States v. Reimer*,
356 F.3d 456 (2d Cir. 2004) . . . . . . . . . . . . . . . 15

*Xie v. INS*,
434 F.3d 136 (2nd Cir 2006) . . . . . . . . . . . . . . 17

**Statutes**

8 U.S.C. § 1252(a)(2)(B)(ii) . . . . . . . . . . . . . . . . . 10

28 U.S.C. § 1254(1) . . . . . . . . . . . . . . . . . . . . . . . . 1

Displaced Persons Act
§ 2(b) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 8

Immigration and Nationality Act ("INA")
  INA § 237(a)(1)(H)
    [8 U.S.C. § 1227(a)(1)(H)] . . . . . . 2, 7, 8, 9, 12
  INA § 237(a)(1)(A). . . . . . . . . . . . . . . . . . . . . . . . . 7
  INA § 237(a)(4)(D)
    [8 U.S.C. §1227(a)(4)(D)] . . . . . . . . . . . . . 3, 7

**Regulations**

8 C.F.R. § 1240.8(d) . . . . . . . . . . . . . . . . . . . . . . . . . 8

22 C.F.R. § 53.32(a) (1949) . . . . . . . . . . . . . . . . . . . . 8

22 C.F.R. § 53.33(j) (1949) . . . . . . . . . . . . . . . . . . . . 8

## PETITION FOR WRIT OF CERTIORARI

Petitioner Vladas Zajanckauskas respectfully petitions the Court for a writ of certiorari to the United States Court of Appeals for the First Circuit.

## OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit in *Zajanckauskas v. Holder* (the "court of appeals") is reported at 611 F.3d 87 (1st Cir. 2010) and is reprinted at App. 1a.[1] The decision of the Board of Immigration Appeals ("BIA") is reprinted at App. 9a. The opinion of the Immigration Judge ("IJ") is reprinted at App. 14a. The Memorandum and Order of denaturalization issued by the United States District Court for the District of Massachusetts in *United States v. Zajanckauskas* (the "district court") is reported at 353 F. Supp. 2d. 196 (D. Mass. 2005) and is reprinted at App. 96a.

## STATEMENT OF JURISDICTION

The court of appeals issued its decision dismissing Petitioner's *Petition for Review of an Order of the Board of Immigration Appeals* for lack of appellate jurisdiction. App. 8a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] Citations to the Appendix are by page number and appear as "App. ___."

## STATUTORY PROVISIONS INVOLVED

1. This case involves application of a waiver of removal pursuant to Immigration and Nationality Act ("INA") § 237(a)(1)(H)[8 U.S.C. § 1227(a)(1)(H)], which states:

> The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 212(a)(6)(C)(i), whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who-
>
> (i)(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and
>
> (II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 212(a) which were a direct result of that fraud or misrepresentation.
>
> (ii) is a VAWA self-petitioner.
>
> A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility

> directly resulting from such fraud or misrepresentation.

2. The reference in paragraph (a)(1)(H) to "an alien described in paragraph (4)(D)" is a reference to INA § 237(a)(4)(D) [8 U.S.C. §1227(a)(4)(D)]. That paragraph provides as follows:

> (a) Classes of deportable aliens
> Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:
>
> (4) Security and related grounds
> (D) Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing.
>
> Any alien described in clause (i), (ii), or (iii) of section 1182(a)(3)(E) of this title is deportable.

## STATEMENT OF THE CASE

### A. Factual Background

Petitioner was born on December 27, 1915, in Lithuania. On May 1, 1939, he was inducted into the Lithuanian Army. The Soviet Union conquered Lithuania shortly thereafter and Petitioner's unit was absorbed into the Soviet Red Army. Within another year, Nazi Germany invaded Soviet Lithuania. App. 97a.

Petitioner was captured by the German Army on July 10, 1941 and sent to several German prisoner of war ("POW") camps. At the Hammerstein, Germany POW camp, Petitioner was recruited to serve in the German Army as a guard. The Germans sent Petitioner along with other Hammerstein POWs to the Trawniki Training Camp ("Trawniki") in Trawniki, Poland. App. 97a. These men would become known as "'Trawniki men." App. 101a.

While courts have characterized such service as "voluntary," the consequences for refusing to serve the Germans were severe enough that refusal was not a viable option. Death was a near certainty for those who remained in prisoner of war camps. Evidence presented to the IJ through expert report demonstrated that Trawniki men who deserted or committed mutiny were returned to prisoner of war camps, sent to concentration camps, or executed.

Petitioner arrived at Trawniki on July 23, 1942. App. 97a. Shortly after arriving at Trawniki, Petitioner was sent to work in the German officer's canteen as a purchaser of food and beverages. App. 102a. Although the timing of Petitioner's assignment to the canteen has been contested, even the government concedes that Petitioner worked in the canteen for a significant period of time. App. 102a. Beyond working in the canteen, no evidence has ever been presented (and no finding has ever been made) with respect to Petitioner's conduct at Trawniki.

During a span of about 18 months, Petitioner was promoted three times. During denaturalization proceedings, a United States District Court ("district court") found that, "[a]lthough promotions were generally awarded on the basis of merit, it remains unclear why [Petitioner] was promoted and [the district court] **draws no conclusions about his service based upon his promotions**." App. 101a.

Finally, the district court found that while at Trawniki, Petitioner was detached to Warsaw, Poland on about April 17, 1943 with a group of Trawniki men during the destruction of the Warsaw Ghetto. App. 107a. The district court made no finding regarding Petitioner's personal conduct in Warsaw.

On January 24, 1950, Petitioner applied for a visa at the United States Consulate in Salzburg, Austria. On his application, Petitioner falsely stated that he was in Lithuania from 1929 to 1944. He did not disclose his service at Trawniki or state that he was deployed to Warsaw. Petitioner was issued a visa under the Displaced Persons Act ("DPA") and entered the United States on February 19, 1950. App. 108a.

On April 28, 1956, Petitioner filed a Petition for Naturalization with the United States Immigration and Naturalization Service. On June 15, 1956, he became a United States citizen. App. 108a. Petitioner has lived in central Massachusetts ever since, within a mile of his daughter, three grandchildren and four great grandchildren. By all accounts, Petitioner has lived a law abiding life in this country. App. 51a–63a.

## B. Procedural Background

### 1. Denaturalization Proceedings

On June 5, 2002, the government initiated denaturalization proceedings in the district court alleging that Petitioner made materially false statements on his visa application in connection with his immigration to the United States after World War Two. At trial, the parties stipulated that the sole issue was whether Petitioner had in fact been detached to Warsaw, Poland in April, 1943.[2] The parties further stipulated that if Petitioner was detached to Warsaw, then his citizenship was unlawfully obtained. App. 98a.

The district court found that Petitioner had been detached to Warsaw in April, 1943 and revoked Petitioner's citizenship. App. 111a-112a. The basis for the district court's finding was the appearance of Petitioner's name on a German detachment order listing 351 Trawniki men. App. 102a-107a. There was no evidence, however, with respect to Petitioner's personal role in Warsaw. This lack of evidence regarding Petitioner's personal role is the main point of contention here and at every stage of Petitioner's immigration proceedings.

On March 23, 2006 the United States Court of Appeals for the First Circuit affirmed the district court's decision in *United States v. Zajanckauskas*, 441 F.3d 32 (1st Cir. 2006). App. 17a.

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[2] The government had previously immunized Petitioner for his misrepresentations regarding his status as a Trawniki man in exchange for Petitioner's testimony against another Trawniki man. *See United States v. Kairys*, 600 F. Supp. 1254, 1261 (N.D. Ill. 1984). The government later discovered the detachment order with Petitioner's name when it was released by the former Soviet Union. Thus, if Petitioner was found to have been deployed to Warsaw, then his failure to disclose this fact would nullify the order of immunity.

### 2. Removal Proceedings

On June 20, 2006, the government initiated removal proceedings by serving Petitioner with a Notice to Appear ("NTA"). App. 17a. The NTA charged that Petitioner was removable because he: (Count 1) ordered, incited, assisted or participated in Nazi persecution, INA § 237(a)(4)(D); (Count 2) was inadmissible at the time of entry under Section 10 of the DPA as an alien who willfully made misrepresentations of material fact for the purpose of gaining admission as a displaced person, INA § 237(a)(1)(A); (Count 3) was inadmissible at the time of entry as an alien not in the possession of a valid visa as a result of his willful and material misrepresentations, INA § 237(a)(1)(A). App. 14a-15a.

On February 23, 2007, the IJ collaterally estopped Petitioner from relitigating the issue of whether he was detached to Warsaw in April 1943 and ordered Petitioner removable on Counts 2 and 3.[3] App. 23a. The IJ, however, did not collaterally estop Petitioner from litigating the issue of whether he personally ordered, incited, assisted or participated in Nazi persecution. Petitioner subsequently filed an application for waiver of removal under INA § 237(a)(1)(H). App. 15a.

Following a one-day hearing on March 27, 2007, the IJ issued a 41-page written decision dated August 1, 2007. App. 14a. In his decision, the IJ held that Petitioner was statutorily barred from receiving a waiver under § 237(a)(1)(H) because the government had met its initial burden of producing "some evidence" that Petitioner assisted or otherwise participated in Nazi persecution. App. 77a. The burden having then shifted to Petitioner, the IJ held that Petitioner had failed to remove the bar by showing by a preponderance of the evidence that he had not participated in Nazi persecution.[4] App. 81a.

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[3] The government thereafter withdrew Count 1. App. 23a.

In addition, the IJ held that Petitioner had not shown that he satisfied the eligibility requirements for a waiver under § 237(a)(1)(H). Specifically, the IJ held that Petitioner did not demonstrate that he was "otherwise admissible to the United States at the time of his entry in 1950." App. 86a. The IJ held that he was ineligible under: (1) the DPA §2(b) as a person who "assisted the enemy in persecution of civil populations"; (2) former 22 C.F.R. § 53.32(a) (1949), as a person whose entry "would be prejudicial to the interests of the United States"; and (3) former 22 C.F.R. § 53.33(j) (1949), as a person who "advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of the Axis countries." App. 88a-89a.

The IJ rejected Petitioner's argument that a waiver under § 237(a)(1)(H) prevented the government from using his wartime whereabouts to establish that he was not "otherwise admissible" at the time of entry. App. 86a. Finally, the IJ held that Petitioner was not eligible for discretionary relief based on a determination that he had misrepresented his wartime whereabouts, including his "assistance in Nazi-assisted persecution," and that Petitioner was not credible. The credibility determination was based primarily on his testimony that he was not in Warsaw in April, 1943. App. 91a-93a.

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[4] Only if the government produces evidence that indicates a statutory bar applies does the burden shift to the respondent to prove by a preponderance of the evidence that the statutory bar does not apply. 8 C.F.R. § 1240.8(d).

For the foregoing reasons, the IJ denied the waiver application under § 237(a)(1)(H) and ordered Petitioner removed to Lithuania. App. 95a. Petitioner timely appealed to the BIA.

On February 25, 2009, the BIA affirmed the IJ and dismissed Petitioner's appeal. App. 13a. The BIA concluded for the most part that the issues raised were directly and properly considered by the IJ. App. 10a. The BIA concluded that the government had presented sufficient evidence to impose the Nazi persecution bar, and that in any event he was ineligible for discretionary relief because of the seriousness of his past acts. App. 11a-12a.

Petitioner then timely petitioned the court of appeals for a review of the BIA's order. App. 5a. Petitioner again challenged the IJ's and BIA's determination that the government had presented sufficient evidence to bar him from receiving a § 237(a)(1)(H) waiver and that Petitioner was ineligible for the waiver as a person who was not "otherwise admissible." App. 5a. In addition, Petitioner challenged the IJ's denial of discretionary relief, arguing that the IJ considered factors he was not permitted to consider when he denied Petitioner discretionary relief, including the IJ's legal conclusion that Petitioner personally participated in Nazi persecution and the IJ's determination the Petitioner was incredible for denying such participation. App. 6a.

On July 13, 2010, the court of appeals dismissed the petition without deciding the legal issues Petitioner raised. The court of appeals held that even if Petitioner were eligible for the waiver, the IJ's denial of discretionary relief rendered consideration of Petitioner's legal issues moot. The court held that the remaining issues were outside of its jurisdiction because, pursuant to 8 U.S.C. § 1252(a)(2)(B)(ii), it could not review "any other decision of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." App. 5a.

The court of appeals noted the IJ properly considered discretionary factors such as that Petitioner:

> (1) had failed to disclose his Trawniki service when he arrived to the United States and instead falsified information in his Application for an Immigrant Visa; (2) further concealed his Trawniki service by indicating that his wife was born in Trakai, Poland, rather than Trawniki, in various immigration documents signed under oath; (3) stated under oath in his denaturalization proceedings that he "thinks" he would lie again to remain in the United States; and (4) offered what the IJ termed implausible, inconsistent, and "minimized" testimony with respect to his service with the German military, leading to adverse credibility

> findings made by the Massachusetts District Court and the IJ himself.

App. 6a-7a. The court of appeals found that relying upon these factors were within the IJ's discretion and unreviewable. App. 7a. Accordingly, the court of appeals dismissed the petition for lack of appellate jurisdiction. App. 7a. This timely petition followed.

## REASONS FOR GRANTING THE PETITION

### A. The court of appeals improperly dismissed the petition for review because the IJ's denial of discretionary relief was based on impermissible factors.

This Court should exercise its supervisory powers to determine whether the court of appeals improperly dismissed Petitioner's *Petition for Review* without first considering the legal questions presented therein. While the court of appeals was correct that it did not have jurisdiction to review the IJ's discretionary determination, the court of appeals did have jurisdiction to review whether the IJ relied on factors that were unproven as a matter of law, i.e., that Petitioner personally participated in Nazi persecution. This legal conclusion was a major underpinning of the IJ's denial of relief. Moreover, the IJ was not permitted to use Petitioner's incredible testimony as a basis to deny discretionary relief.

### 1. In denying discretionary relief, the IJ factored in his erroneous legal conclusion that Petitioner personally participated in Nazi persecution, a legal conclusion that the court of appeals should have reviewed.

One of the decisive factors that the IJ relied upon in denying Petitioner discretionary relief was the IJ's erroneous legal conclusion that Petitioner's mere presence in Trawniki and Warsaw amounted to proof of personal participation in Nazi persecution. The IJ made this finding in the context of the statutory bar to § 237(a)(1)(H), which bars eligibility for a waiver to any alien found to have **personally participated** in Nazi persecution (hereinafter, the "Nazi persecution bar"). The IJ thereafter incorporated this erroneous conclusion as a factor in denying Petitioner discretionary relief. The application of this contested legal conclusion to the IJ's discretionary analysis made it incumbent upon the court of appeals to review the issue prior to dismissal. Petitioner has maintained throughout his removal proceedings that the government did not produce sufficient evidence to prove that Petitioner personally participate in Nazi persecution.

With respect to persecution bars in general, courts have required evidence of individual accountability. "Mere acquiescence or membership in an organization, is insufficient to satisfy the persecutor exception." *Alvarado v. Gonzales*, 449 F.3d 915, 926 (9th Cir. 2006)(internal quotes omitted). Thus, the government was required to show that Petitioner "personally ordered, incited, assisted, or otherwise participated in the persecution of individuals." *Id.* at 926 n.8 [quoting

*Laipenieks v. INS*, 750 F.2d 1427, 1431 (9th Cir. 1985)].

In *Fedorenko v. United States*, 449 U.S. 490 (1981), this Court addressed the meaning of assisting in persecution in the context of the DPA. There, this Court held that Fedorenko had assisted in persecution because he was an armed guard at Treblinka and on at least one occasion had fired shots in the direction of fleeing prisoners. *Id.* at 500. The *Fedorenko* Court made it clear that not every person in a German concentration camp can be said to have "assisted" in persecution. Rather, it created what has now been referred to as a "continuum of conduct" that purports to draw the line between assistance and mere acquiescence or membership in a group that was involved in persecution. The Court explained that:

> [A]n individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians.

*Id.* at 514, n.34. At least two Circuits (the Ninth and the Sixth) have required proof of actual participation, although the IJ dismissed those holdings as having "disregarded the plain language of the Holtzman

Amendment in [their] determination that those who did not take an 'active role' in persecution did not assist or otherwise participate in Nazi-sponsored persecution." App. 82a.

In *Laipenieks*, *supra*, the Ninth Circuit held that under the phrase "ordered, incited, assisted or otherwise participated" in Nazi persecution requires evidence that "the individual in question **personally** ordered, incited, assisted or otherwise participated in the persecution of individuals." *Laipenieks*, 750 F.2d at 1431(emphasis added). Membership in the Nazi party alone, without proof of "personal active assistance or participation," is not enough to find that an individual persecuted others. *Id.*

In *Petkiewytsch v. INS*, 945 F.2d 871 (6th Cir. 1991), the Sixth Circuit held that the alien had not assisted in persecution for purposes of the Holtzman Amendment because he had served involuntarily as an armed civilian guard in a labor education camp in Germany. *Id.* at 872, 881. There, the alien was found to have guarded the perimeter of the camp and was present when prisoners were mistreated but "never used his rifle, never struck a prisoner and never personally inflicted any form of abuse upon prisoners beyond impeding their escape through his presence as a civilian guard." *Id.* at 872-873. Under those circumstances, the Sixth Circuit held that the alien had not assisted in persecution, reasoning that the alien "did not ever fire his rifle or otherwise abuse or attempt to injure an inmate."[5] *Id.* at 880.

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[5] *But see Negele v. Ashcroft*, 368 F.3d 981, 983-84 (8th Cir. 2004), discussing several cases including *Petkiewytsch* and concluding

Courts that have found assistance or participation in Nazi persecution have typically done so only where the government presented evidence of personal participation. *See, e.g.*, *United States v. Kumpf*, 438 F.3d 785, 790 (7th Cir. 2006) (finding personal assistance where defendant admitted standing guard over prisoners at Trawniki); *United States v. Reimer,* 356 F.3d 456, 459 (2d Cir. 2004)(finding persecution where defendant was an armed guard during ghetto clearings, was present and armed when civilians were thrown into a pit and murdered, and "fired on command when one of those in the pit was observed to be still alive."); *Hammer v. INS*, 195 F.3d 836, 843 (6th Cir. 1999)(finding evidence showed service as an armed guard at Auschwitz and Sachsenhausen concentration camps, as well as an escort on prisoner rail transports); *United States v. Breyer*, 41 F.3d 884, 890 (3d Cir. 1994)(uncontroverted evidence that defendant was an armed guard at concentration camps as part of SS Death's Head Battalion); *United States v. Hansl,* 364 F. Supp. 2d 966, 979 (D. Iowa 2005)(stating alien's admission that he was a SS Death's Head guard ample to find defendant personally advocated or assisted in persecution).

Here, the IJ clearly stated that he "makes no finding regarding the specific actions [Petitioner]

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that by impeding prisoners' escape through his presence as an armed SS Death's Head Battalion Guard, Negele was actively and personally involved in persecution. In effect, the *Negele* Court read the factor in *Fedorenko* that Fedorenko had fired at escaping inmates as superfluous. That a specific role on a continuum may be viewed as over or not over the line by different courts is not surprising; but both the *Negele* and *Petkiewytsch* Courts required personal culpability.

performed in Warsaw." App. 69a. Instead, the IJ relied improperly on Petitioner's "mere acquiescence or membership in an organization," to base his finding that he assisted in persecution. *See Alvarado*, 449 F.3d at 926. For example, the IJ held that the government had established Petitioner's active participation in Warsaw through the transcript of the government's expert witness in his district court trial. App. 78a. The IJ found that through that testimony, "the Government has demonstrated that Trawniki men such as [Petitioner] participated in the destruction of the Warsaw Jewish Ghetto...." App. 78a. The IJ made additional generalizations about Petitioner based on his status as a Trawniki man. App. 78a. Generalizations, however, are not evidence of Petitioner's personal participation. While evidence with respect to the actions of Trawniki men in Warsaw may establish that, as a group, Trawniki men were involved in acts of persecution, this evidence does not establish Petitioner's personal role.

Moreover, the IJ attempted to draw a distinction between "a determination of whether an individual *actually* assisted or participated in Nazi-sponsored persecution, with the determination of whether the Government met its initial burden of proof and put forth 'some evidence' that [Petitioner] assisted or participated in said persecution." App. 79a. He concluded that "there is no threshold requirement mandating that the evidence establish the precise extent of the [Petitioner's] involvement in said persecutory acts or whether he was held individually accountable for those acts." App. 79a-80a.

This legal conclusion should be rejected by this Court. In *Castaneda-Castillo v. Gonzalez*, 488 F.3d 17

(1st Cir. 2007) (en banc), the First Circuit addressed the persecutor bar in the analogous asylum context. After reviewing the case law, the court of appeals stated that there was a need for some degree of subjective fault.[6] *Id.* at 21.

There, the government had proven that the alien, as part of a Peruvian military unit, was posted to block escape routes during a village massacre. *Id.* at 19. Given the proof of this role, the court of appeals found that the government had produced enough evidence of personal participation to shift the burden to the alien. *Id.* at 21 n.3. The court held that the alien's burden was to show by a preponderance of the evidence that he lacked the requisite knowledge that the massacre was going to occur. In other words, unknowing assistance was not sufficient to prove subjective fault, but the role played was sufficient to shift the burden [because it provides an inference (that of course can be overcome) of subjective fault].

Petitioner's mere presence in Warsaw was not the functional equivalent of blocking escape routes and was insufficient to satisfy the government's burden of proof. While the BIA concluded that even logistical support was sufficient, (App. 11a), this conclusion ignores the *Fedorenko* Court's concept of a continuum of conduct. *See Fedorenko*, 449 U.S. at 514, n.34(the individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians).

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[6] See discussion in *Chen v. United States Attorney General*, 513 F.3d 1255 (11th Cir. 2008) of this issue in the asylum context citing *Hernandez v. Reno*, 258 F.3d 806, 813 (8th Cir. 2001) (the individual's personal culpability must be assessed); *Singh v. Gonzales*, 417 F.3d 736, 739 (7th Cir. 2005) (distinction between "genuine assistance in persecution and inconsequential association with persecutors."); *Xie v. INS*, 434 F.3d 136, 143 (2nd Cir 2006) (distinction between active conduct having "direct consequences for the victims," and conduct merely "tangential to the acts of oppression and passive in nature."); *Im v. Gonzales*, 497 F.3d 990, 997 (9th Cir. 2007) ("the degree to which [applicant's] conduct was central, or integral, to the relevant persecutory acts.").

Similarly, Petitioner's mere presence at Trawniki does not amount to personal participation. The only finding with respect to Petitioner's conduct at Trawniki was that he was a purchaser of food in the camp officer's canteen. No court has ever found that Petitioner performed in any other capacity at Trawniki. Petitioner's role as a purchaser of food for camp officers is certainly on par with the individual who cuts the hair of prisoners.

The IJ's legal conclusion that Petitioner participated in Nazi persecution was error. Because this conclusion was a decisive factor in the IJ's denial of discretionary relief, it was incumbent upon the court of appeals to review this conclusion before dismissing on jurisdictional grounds.

### 2. The IJ's finding that Petitioner did not present credible testimony is not a proper basis for denying discretionary relief.

The IJ also found Petitioner's incredible testimony a decisive factor. The IJ noted specifically that Petitioner "provided implausible, inconsistent, and 'minimized' testimony with respect to his service with the German military, his treatment at Hammerstein Camp, his training and experiences at Trawniki Camp, and his eventual deployment to Warsaw." App. 93a. Citing *Matter of Tijam*, 22 I&N Dec. 408, 413-414 (BIA 1998), the Immigration Judge found that this incredible testimony to be a "severe adverse" factor. App. 93a. *Tijam*, however, stands for the proposition that **false** testimony is a severe adverse factor, not testimony that the Immigration Judge found incredible. There is a significant distinction between false and incredible testimony. Indeed, in *Tijam*, the BIA remanded for further hearings because the Immigration Judge "did not make an **explicit finding that the respondent gave false testimony** during her deportation hearing." *Id.* at 414 (emphasis added). That is, without such a finding, the IJ was not permitted to use the testimony as an aggravating factor.

Here, the IJ found that the "key credibility issue in this case involves the [Petitioner's] dishonesty concerning whether he went to Warsaw with the Trawniki men." App. 68a. But Petitioner's continued denials that he went to Warsaw, credible or not, do not establish that Petitioner gave patently false testimony. In any context, a court's determination that a witness's testimony was not credible is not tantamount to proof that the witness committed perjury. *Moore v. Chesapeake & O. R. Co.*, 340 U.S. 573, 576 (1951)("[I]t is the jury's function to credit or discredit all or part of the testimony. But disbelief of...testimony would not supply a want of proof.")

The case of John Demjanjuk serves a significant cautionary tale. Demjanjuk was a Trawniki man that a court determined was the notorious death camp guard "Ivan the Terrible." Demjanjuk maintained his innocence for years and was eventually exonerated.

*See Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993)(detailing history of case).

Here, the IJ was not permitted to hold Petitioner's denial of wrongdoing against him. While Petitioner was estopped from re-litigating the issue of his presence in Warsaw, he was not required to alter his testimony during his hearing. The IJ was free to disbelieve Petitioner but, absent an explicit finding that Petitioner gave false testimony, he was not legally permitted to use this testimony as an aggravating factor in the discretion analysis.

## CONCLUSION

In short, the court of appeals' holding that it did not have jurisdiction to review Petitioner's *Petition for Review* was erroneous. For the foregoing reasons, this Court should grant the petition for writ of certiorari.

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# APPENDIX

# APPENDIX

## TABLE OF CONTENTS

Appendix A: Opinion, United States Court of Appeals for the First Circuit (7/13/10) . . . . . . . . . . . . . . . . . . . 1a

Appendix B: Decision of the Board of Immigration Appeals, U.S. Department of Justice Executive Office for Immigration Review Board of Immigration Appeals (2/25/09) . . . . . . . . . . . . . . . . . . . 9a

Appendix C: Decision of the Immigration Judge, The United States Department of Justice Executive Office for Immigration Review, United States Immigration Court Boston, Massachusetts (8/4/07) . . . . . . . . . . . . . . . . . . . 14a

Appendix D: Memorandum of Decision/Order, United States District Court District of Massachusetts (January 26, 2005) . . . . . . . . . . 96a

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 09-1394

[Filed July 13, 2010]

VLADAS ZAJANCKAUSKAS, )
)
Petitioner, )
)
v. )
)
ERIC H. HOLDER, JR., )
ATTORNEY GENERAL OF )
THE UNITED STATES, )
)
Respondent. )

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Before

Lynch, Chief Judge,
Torruella and Boudin, Circuit Judges.

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Robert L. Sheketoff, Thomas Butters, and Butters Brazilian LLP on brief for petitioner.

William Henry Kenety V, Edgar Chen, Senior Trial Attorneys, United States Department of Justice, Lanny A. Breuer, Assistant Attorney General, Criminal Division, Eli M. Rosenbaum, Director, and Susan L. Siegal, Senior Litigation Counsel, on brief for respondent.

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July 13, 2010

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**TORRUELLA, Circuit Judge.** Petitioner Vladas Zajanckauskas is a ninety-five year old Lithuanian native who has been in the United States since 1950. He appeals an order of the Board of Immigration Appeals ("BIA") affirming the Immigration Judge's ("IJ") decision to order his deportation from the United States. Because we find we are without jurisdiction to review either the IJ's or the BIA's (collectively "the Agency") decision, we dismiss the petition.

## I.

Petitioner's citizenship was revoked in 2005 because the district court found that he had been deployed to Warsaw with a detachment of Trawniki-trained guards who participated in the Nazi liquidation of the Jewish ghetto there and that he lied about his wartime whereabouts by concealing this fact in his application for an entry visa. United States v. Zajanckauskas, 353 F. Supp. 2d 196 (D. Mass. 2005);

see also United States v. Zajanckauskas, 441 F.3d 32 (1st Cir. 2006) (affirming). On June 20, 2006, the government served Petitioner with a Notice to Appear ("NTA") charging him removable (1) under § 237(a)(4)(D) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(4)(D), as an alien who assisted in Nazi-sponsored persecution (Count I);[1] (2) under INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A), because he was inadmissible at the time of entry under the Displaced Persons Act of 1948 ("DPA"), 62 Stat. 1009 § 10, as an alien who willfully made misrepresentations of material fact for the purpose of gaining admission as a displaced person (Count II); and (3) under INA § 237(a)(l)(A), 8 U.S.C. § 1227(a)(1)(A), because he was inadmissible at the time of entry under the Immigration Act of 1924, 43 Stat. 153 § 13(a), as an alien not in possession of a valid visa as a result of his misrepresentations (Count III). The IJ applied collateral estoppel to the factual and legal conclusions made by the district court that revoked Petitioner's citizenship, see Zajanckauskas, 353 F. Supp. 2d at 196-203, and ordered Petitioner removed to Lithuania based on Counts II and III in the NTA.

Petitioner does not dispute the findings of fraud. Rather, he seeks relief from removal in the form of a waiver under INA § 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H).[2] After a hearing, the IJ issued a

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[1] Count I was later withdrawn by the government.

[2] In relevant part:

> (H) Waiver authorized for certain misrepresentations The provisions of this paragraph relating to the removal

41-page decision denying Petitioner's claims on three separate grounds. First, the IJ held that Petitioner was statutorily ineligible to receive the waiver because the government had presented evidence that Petitioner assisted in Nazi persecution by participating in the destruction of the Warsaw Ghetto and that Petitioner failed to rebut the government's evidence by a preponderance of the evidence. Second, the IJ held that Petitioner was not "otherwise admissible" at the time of his entry, as required by the statute. Finally, the IJ held that regardless of Petitioner's statutory eligibility for a waiver, after weighing all the factors, Petitioner's "misrepresentations to United States Government officials [for] approximately sixty years" did not merit the IJ's exercise of discretion in granting the waiver.

---

> of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 1182(a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who--
> (i)(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and (II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182(a) of this title which were a direct result of that fraud or misrepresentation.

(emphasis added). Paragraph (4)(D) refers to aliens who "[p]articipated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing" as defined by 8 U.S.C. §§ 1182(a)(3)(E)(i), (ii), and (iii). Petitioner contests the IJ's holdings as to the underlined portions.

Petitioner appealed to the BIA, which agreed with the IJ on all points and affirmed. Petitioner timely appealed to this Court.

## II.

On appeal, Petitioner argues that the Agency erred in its conclusion that he was statutorily ineligible for a waiver forgiving the two fraud-related grounds of removal under INA § 237(a)(1)(H) and also in its determination that even if Petitioner was not statutorily barred from relief, he did not merit a favorable exercise of the Agency's discretion. As a threshold matter, the government argues that we must dismiss Petitioner's appeal because our opinion would be no more than advisory in this case.[3] Specifically, the government contends that we lack jurisdiction to review the discretionary ground upon which the IJ rested his decision, and since a reversal of the two grounds we have jurisdiction to review would not change the outcome, review of the legal questions would be moot. We agree.

Petitioner urges us to review various legal issues surrounding the Agency's determination that he was ineligible for the waiver. However, 8 U.S.C. § 1252(a)(2)(B)(ii) establishes that we are without jurisdiction to review "any other decision of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security." Cf. Onikoyi v. Gonzales, 454 F.3d 1, 3 (1st Cir. 2006) ("We do not have jurisdiction to review the discretionary denial of waiver[s] of inadmissibility under 8 U.S.C. § 1252(a)(2)(B)(i)"). The statute under which Petitioner seeks protection plainly falls within this rubric, as it states that "[t]he provisions . . . relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission . . . may, in the discretion of the Attorney General, be waived for any alien . . . ." 8 U.S.C. § 1227(a)(1)(H); cf. Kucana v. Holder, 130 S. Ct. 827, 831 (2010) (holding that § 1252(a)(2)(B)(ii)'s jurisdictional bar applies "only to Attorney General determinations made discretionary by statute"). While "some discretionary determinations do present underlying, reviewable questions of law," Lumataw v. Holder, 582 F.3d 78, 85, 86 (1st Cir. 2009)(finding that "the question of whether the IJ and BIA applied the correct filing deadline in assessing the timeliness of [petitioner's] asylum application constitute[d] a 'question of law'"), this is not such a case.

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[3] Petitioner failed to respond to this argument by the government.

Petitioner argues that the "the IJ denied discretionary relief here because of the firmly held conviction that [Petitioner] engaged in serious past acts." The IJ, however, did more than what Petitioner suggests. After considering the balance of favorable equities supporting relief for Petitioner -- including favorable factors such as his advanced age and medical conditions, his nearly sixty years in the United States, his large and very close family, and the fact that he has no criminal record in the United States -- the IJ found that Petitioner did not merit the Agency's exercise of discretion. The IJ found decisive that Petitioner (1) had failed to disclose his Trawniki service when he arrived to the United States and instead falsified information in his Application for an

Immigrant Visa; (2) further concealed his Trawniki service by indicating that his wife was born in Trakai, Poland, rather than Trawniki, in various immigration documents signed under oath; (3) stated under oath in his denaturalization proceedings that he "thinks" he would lie again to remain in the United States; and (4) offered what the IJ termed implausible, inconsistent, and "minimized" testimony with respect to his service with the German military, leading to adverse credibility findings made by the Massachusetts District Court and the IJ himself. All of these grounds are surely factual and within the IJ's discretion, and as such, we are powerless to review them. Lumataw, 582 F.3d at 85 ("[D]iscretionary or factual determinations continue to fall outside our jurisdiction") (internal quotation and other marks omitted).

Even if we agree with Petitioner as to the legal issues he raises on appeal, the result in his case -- removal from the United States -- is pre-ordained by the Agency's discretionary holding. Thus, we must dismiss his appeal. Ekasinta v. Gonzales, 415 F.3d 1188, 1191 (10th Cir. 2005) ("[I]f there are two alternative grounds for a decision and we lack jurisdiction to review one, it would be beyond our Article III judicial power to review the other. Absent authority to review the discretionary ground, any opinion of ours reviewing the nondiscretionary ground could not affect the final order's validity and so would be advisory only."). We dismiss the petition for lack of appellate jurisdiction.

**Dismissed**.

# UNITED STATES COURT OF APPEALS
# FOR THE FIRST CIRCUIT

**No. 09-1394**

**[Entered July 13, 2010]**

VLADAS ZAJANCKAUSKAS,

Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF
THE UNITED STATES,

Respondent.

## JUDGMENT

This cause came on to be submitted on a petition for review of an order of the Board of Immigration Appeals.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The petition for review is dismissed.

By the Court:

/s/ Margaret Carter, Clerk

cc: Mr. Thompson, Mr. Kenety, Mr. Butters, Ms. Bing, Mr. Sheketoff and Mr. Chen.

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## APPENDIX B

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**U.S. Department of Justice**
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A007 413 139 - Boston, MA Date:
FEB - 25 2009

In re: VLADAS ZAJANCKAUSKAS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Thomas J Butters, Esquire and
Matthew Thompson, Esquire

ON BEHALF OF DHS:
Edgar Chen and William Kenety
Trial Attorneys
Office of Special Investigations, Criminal Division
U.S. Department of Justice

APPLICATION: Waiver of inadmissibility

In a decision dated August 2, 2007, an Immigration Judge found the respondent removable and denied his application for a waiver of inadmissibility under section 237(a)(1)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(H). The respondent's appeal from this decision will be dismissed and the decision of the Immigration Judge affirmed.

The only issues the respondent raises on appeal concern his eligibility for the requested waiver, which the Immigration Judge denied, finding that the respondent had participated in Nazi persecution and was therefore ineligible for the waiver. Since the application was filed after May, 11, 2005, it is governed by the provisions of the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). We review the findings of fact, including credibility determinations, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including whether the parties have met the relevant burdens of proof, and issues of discretion, under a *de novo* standard. 8 C.F.R. § 1003.1(d)(3)(ii). The Immigration Judge concluded that the respondent lacked credibility and he outlines several important inconsistencies. We find no clear error in his assessment.

In his appeal, the respondent raises arguments that were for the most part directly and properly considered by the Immigration Judge, whose comprehensive decision reflects a thorough and careful analysis of the law and evidence at issue. The Immigration Judge correctly found that the Government had met its burden by showing some evidence that indicated that the Nazi persecution bar should apply. 8 C.F.R. § 1240.8(d); *see Matter of S-K-*, 23 I&N Dec. 936 (BIA 2006). While the respondent argues that his presence in Warsaw at the time of the persecution does not show that he was "personally" involved and that he, at most, simply provided logistical support, the record does not support this claim. To the extent the respondent cites the Immigration Judge's statement that he makes no finding regarding the respondent's specific actions, we note that the Immigration Judge also outlines the evidence of record supporting the charge that the individuals in the respondent's group who were deployed to Warsaw did participate in the destruction of the Warsaw ghetto. Further, the evidence shows that those involved only in support functions are specifically indicated on a particular list, and the respondent's name was not on that list (I.J. at 28). As further noted by the Immigration Judge, even logistical support, when considered with the respondent's knowledge that the persecutory actions were taking place, would constitute persecution. *See Castaneda-Castillo v. Gonzales*, 488 F.3d 17 (1st Cir. 2007) (requiring some knowledge of actions of persecutor for persecution bar to asylum to apply). The respondent appears to have had considerable freedom during his service, and was promoted several times. He also had access to and obtained a pistol at one point in his service.

The Government has presented a great deal of evidence indicating that the bar to relief for participation in Nazi persecution applies. The burden of proof, therefore, shifts to the respondent to show by a preponderance of the evidence that the bar does not apply. 8 C.F.R. § 1240.8(d) Given the lack of credibility, we agree with the Immigration Judge that the respondent has failed to meet this burden. The Immigration Judge considered all the evidence of record in determining that the respondent played a role greater than he claims. This evidence includes, among additional support, the respondent's promotions within the organization and his inconsistent statements concerning whether or not he was actually in Warsaw at the time of the destruction of the ghetto. It also includes evidence that the respondent was present in the Warsaw ghetto as a "Trawniki man," that atrocities were committed by the Trawniki men during the liquidation of the ghetto, and that the respondent was not listed as among the few members of the group who acted only in a supporting capacity. We agree with the Immigration Judge that the respondent is barred from receiving a waiver of inadmissibility under section 237(a)(1)(H) of the Act due to his assistance in Nazi persecution.

Moreover, even were the respondent to be found eligible, the Immigration Judge also properly addressed the issue of whether or not a waiver under section 237(a)(1)(H) of the Act waives the facts underlying the respondent's fraud. The Immigration Judge found that it did not and the respondent would have been otherwise inadmissible at the time of his entry. While the respondent may use this waiver to avoid removability based on his misrepresentations, we agree with the Immigration Judge that he is unable to use it to waive his actions in the past that led him to provide these misrepresentations. He is, therefore, not otherwise admissible. *See Reid v. INS,* 420 U.S. 619 (1975); *Errico v. INS,* 385 U.S. 214 (1966).

In closing, despite the equities in the respondent's case, due to his continued fraud in this country, in addition to the seriousness of his past acts, we agree with the Immigration Judge that the respondent would not in any event deserve the requested relief in the exercise of discretion. While the respondent argues that he should not be denied this relief solely due to his representations that he was not involved in the destruction of the Warsaw ghetto, the Immigration Judge actually based his decision on a totality of the circumstances (I.J. at 39-40). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed and the decision of the Immigration Judge is affirmed.

/s/ David B. Holmes
FOR THE BOARD

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## APPENDIX C

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**THE UNITED STATES**
**DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR**
**IMMIGRATION REVIEW**
**UNITED STATES IMMIGRATION COURT**
**BOSTON, MASSACHUSETTS**

**No. A 07 413 139**

**[Filed August 4, 2007]**

IN THE MATTER OF: )
)
ZANJANCKAUSKAS, Vladas )
A 07 413 139 )
)
Respondent )
)

**August 1, 2007**

**In Removal Proceedings**

CHARGES: **Count 1:** Immigration and Nationality Act ("INA") § 237(a)(4)(D): Alien Who Has Ordered, Incited, Assisted, or Participated in Persecution;

**Count 2:** INA § 237(a)(1)(A): Alien Who at the Time of Entry or Adjustment of Status Was Within One or More of the Classes of Aliens Inadmissible by Law, to wit: Alien who, Under Section 10 of the Displaced Persons Act of 1948, 62 Stat. 1009 (1948) ("DPA"), Willfully Made Misrepresentations of Material Fact for the Purpose of Gaining Admission to the United States as a Displaced Person;

**Count 3:** INA § 237(a)(1)(A): Alien Who, At the Time of Entry or Adjustment of Status, Was Within One or More of the Classes of Aliens Inadmissible by Law, to wit: As a Direct Result of Willful, Material Misrepresentations of Material Fact, an Alien Not In Possession of a Valid, Unexpired Visa under the Immigration Act of 1924, 43 Stat. 153 (1924) ("1924 Act").

**APPLICATIONS:** INA § 245(a): Adjustment of Status
INA § 237(a)(1)(H): Waiver

## APPEARANCES

**ON BEHALF OF RESPONDENT:**
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## DECISION OF THE IMMIGRATION JUDGE

## I. PROCEDURAL HISTORY

### A. Denaturalization Proceedings

On June 5, 2002, the Government commenced a civil action against the Respondent alleging that he made materially false statements on his visa application in association with his immigration to the United States.

On January 26, 2005, the United States District Court for the District of Massachusetts ("District Court") held that the Respondent was subject to denaturalization because he had made willful and material misrepresentations on his visa application. *United States v. Zajanckauskas*, 353 F. Supp. 2d 196 (Mass. Dist. Ct. 2005). Specifically, the District Court concluded that the Respondent made misrepresentations to conceal his location in Poland during World War II and his activities as part of a unit that participated in the liquidation of the Warsaw Ghetto. *Id.* The District Court found that these misrepresentations rendered him legally ineligible for a visa under the Displaced Persons Act 1948, 62 Stat. 1009 (1948) ("DPA"). *Id.*

On March 23, 2006, the United States Court of Appeals for the First Circuit affirmed the findings of the District Court. *See United States v. Zajanckauskas*, 441 F.3d 32 (1st Cir. 2006).

### B. Removal Proceedings

#### 1. Notice to Appear

On June 20, 2006, the Government served the Respondent with a Notice to Appear ("NTA"). *See* Exhibit 1. The NTA makes the following factual allegations:

(1) The Respondent is not a citizen or national of the United States.
(2) The Respondent was born on December 27, 1915, in Aukstadvaris, in what is today independent Lithuania.
(3) In May of 1939, the Respondent was inducted into the Lithuanian Army, which, following the Soviet annexation of Lithuania in 1940, was incorporated into the Soviet Army. He was captured by the Germans in July of 1941, and held in a German prisoner of war ("POW") camp.
(4) In mid-1942, the Respondent was recruited for German service. On July 23, 1943, the Respondent arrived at the Trawniki Training Camp near the town of Trawniki, in Nazi-occupied Poland. At Trawniki, he received Trawniki identification number 2122, and was

assigned the rank of Wachmann (guard private).

(5) The Trawniki Training Camp was established to meet the Geman manpower needs and to supplement German military, police, and related units. Run jointly by the Nazi Schutstaffel ("SS") and the German police, it was designed to train individuals of various eastern European nationalities for German service.

(6) "Trawniki men" (as Trawniki trained guards were sometimes termed in wartime records) participated in every aspect of the implementation of "Operation Reinhard," the Nazi effort to murder Jews in Poland. The activities of Trwaniki men included extracting Jews from ghettos in German-occupied territories and deporting them to killing centers and labor camps; guarding the killing facilities at Belzec, Sobibor, and Treblinka, where tens of thousands of Jews were killed by gassing; and guarding forced labor camps, including the Trawniki Labor Camp, located adjacent to the Trawniki Training Camp.

(7) As a Trawniki man, the Respondent was paid and received other benefits, including home leave. He underwent the same training as other Trawniki recruits, which included practicing close-order drills, learning how to shoot various kinds of firearms, learning German-language commands, learning how to guard prisoners, and ideological instruction. He also received additional training in a course for future Trawniki non-commissioned officers ("NCOs") and rose quickly, after two promotions, to the rank of Gruppenwachmann (guard sergeant).

By April of 1943, he had become a trainer in the NCO course.

(8) In April of 1943, the Germans decided to completely liquidate the Warsaw Jewish Ghetto, which had been created beginning in 1939 to physically isolate the Jewish population of Warsaw and Jews from surrounding areas under horrific and often deadly conditions. At its peak in March of 1941, the Ghetto contained approximately 445,000 Jews. In April of 1943, as part of Operation Reinhard, German authorities reduced the population of the Warsaw Ghetto by approximately eighty-five percent. Many Jews confined in the Ghetto died of starvation and disease; many were transported to slave labor camps; and the rest were murdered at Treblinka. During the final Ghetto liquidation action, the remaining Jews were to be deported to either concentration camps, labor camps, or Treblinka.

(9) To help accomplish the liquidation of the Warsaw Jewish Ghetto, on April 17, 1943, a battalion of 351 Trawniki men was ordered to Warsaw to participate in the liquidation. The Respondent and other members of the NCO training course at Trawniki and their trainers were deployed to Warsaw as part of this battalion.

(10) The Germans commenced their assault on the Warsaw Ghetto on April 19, 1943. In addition to Trawniki men, the Germans used men from the armed forces, the SS, and the police. The duties of the Trawniki men assigned to Warsaw included standing in the cordon around the Ghetto to prevent Jews from escaping; guarding the transit square where captured Jews awaited

rail transport to concentration camps, labor camps, and Treblinka; and escorting the train transports of captured Jews to their final destinations. Trawniki men also conducted house-to-house searches in the Ghetto for hidden Jews; skirmished with resistance fighters; rousted Jews hiding in bunkers; and took part in the shooting of some captured Jews, either as the actual trigger-men or as cordon guards.

(11) The Warsaw operation was expected to take only a few days. However, the Ghetto inhabitants resisted with unanticipated force and began an armed uprising, which lasted for several weeks. The operation continued until mid-May 1943, by which time the resistance was crushed and the Ghetto was cleared and destroyed. Thousands of Jews were killed during this operation, thousands more were sent to be gassed at Treblinka, and thousands were shipped to concentration and labor camps.

1. After the Respondent was deployed to Warsaw, he returned to Trwaniki. He served at Trawniki until July of 1944, when German forces evacuated the camp and the surrounding area. The commandant of the Trawniki Training Camp organized the remaining Trawniki guards into a unit bearing his name, the SS Battalion Streibel. The Respondent served on the Streibel Battalion until March 4, 1945.
2. In 1949 or early 1950, the Respondent sought a determination from the United States Displaced Persons Commission ("DPC") that he was eligible to receive an immigrant visa under the DPA. In seeking

this determination, he concealed and misrepresented his wartime location and activities, including his service at Trawniki and his deployment to Warsaw in April and/or May of 1943 for the Ghetto liquidation.

3. On January 24, 1950, he filed an Application for Immigration Visa and Alien Registration with the United States Consulate in Salzburg, Austria, in order to receive a visa to enter the United States under the DPA. On his visa application, he concealed and misrepresented his wartime location and activities, including his wartime location and activities and his service at Trawniki and his deployment to Warsaw in April and/or May of 1943, for the Ghetto liquidation.
4. The Respondent was issued a DPA visa, which he used to enter the United States in February 1950.
5. On June 15, 1956, the Massachusetts Superior Court entered an order admitting him to United States citizenship. Pursuant to that order, he was issued naturalization certificate number 744933. By order dated January 26, 2005, the District Court revoked his naturalization certificate.

As a result of these allegations, the NTA charged the Respondent with three counts of removability. *Id.* Count 1 charged that the Respondent was removable pursuant to INA § 237(a)(4)(D) as an alien who had ordered, incited, assisted, or participated in persecution. *Id.* Counts 2 and 3 charged that the Respondent was removable pursuant to INA § 237(a)(1)(A), as an alien who, at the time of entry or adjustment of status, was within one or more of the classes of aliens inadmissible by law. *Id.* Specifically, Count 2 charged that the Respondent was inadmissible under Section 10 of the DPA, as an alien who willfully made misrepresentations of material fact for the purpose of gaining admission to the United States as a displaced person, while Count 3 charged that the Respondent was inadmissible pursuant to the 1924 Act, as an alien who was not in possession of a valid, unexpired visa as a direct result of willful, material misrepresentations of material fact. *Id.*

### 2. Pleadings

In pleadings filed on October 27, 2006, the Respondent admitted factual allegations 1-6, 8, 10-11, and 15-16 in the NTA. *See* Exhibit 4. The Respondent denied the remaining allegations and denied that he was removable from the United States. *Id.* The Respondent then designated Lithuania as the country of removal. *Id.*

### 3. Filings Submitted and Rulings Issued Prior to Removal Hearing

On December 26, 2006, the Government filed a Motion for the Application of Collateral Estoppel and Judgment as a Matter of Law. *See* Group Exhibit 13. In its Motion, the Government argued that the Court should give preclusive effect to the factual findings and legal conclusions made by the District Court in *Zajanckauskas v. United States, supra. Id.* The Government also argued that a decision to give these findings and conclusions preclusive effect would render the Respondent removable as charged and bar him from receiving relief from removal. *Id.*

On January 12, 2007, the Respondent filed an Opposition to the Government's Motion, wherein he argued that collateral estoppel did not prevent the Court from litigating the issue of whether he persecuted others, as it was not an issue previously litigated in the District Court and was unnecessary for a judgment of denaturalization. *Id.* On February 5, 2007, the Government responded to this Opposition in a Reply Brief. *See* Exhibit 15.

In a ruling issued on February 23, 2007, the Court granted the Government's motion in part and denied it in part. *See* Exhibit 16. The Court gave preclusive effect to the District Court's factual findings in the Respondent's denaturalization proceedings, to the extent that these factual findings established the truth of allegations 9 and 14 in the NTA. *Id.* As a result of its ruling that the Respondent was collaterally estopped from relitigating allegations 9 and 14, the Court concluded that the Respondent was removable by clear and convincing evidence, as charged in Counts 2 and 3 of the NTA. *Id.*

The Court did not resolve the removal charge contained in Count 1 in the NTA as a matter of law. *Id.* The Court's reasoning in reaching its decision on this motion is outlined in detail in the February 23, 2007, written decision found at Exhibit 16. The Govemment subsequently withdrew Count 1.

### 4. March 27, 2007, Hearing and Related Submissions

#### A. Government's Pre-Hearing Memorandum

On March 6, 2007, the Government submitted a Pre-hearing Memorandum, along with a proposed witness list, a list of exhibits, and an explanation of how the submitted exhibits demonstrate that the Respondent assisted or otherwise participated in Nazi persecution. *See* Exhibit 8. The Government's proposed witness list included: (1) the Respondent; (2) Dr. Peter Black, former Chief Historian of the Office of Special Investigations in the United States Department of Justice; and (3) Mr. Samuel Hilton, a survivor of the final liquidation of the Warsaw Ghetto in April and May of 1943.

#### B. March 27, 2007, Hearing

On March 27, 2007, the Respondent testified as to the merits of his Applications for Aqjustment of Status and a Waiver pursuant to INA § 5 237(a)(1)(H). At the conclusion of the Respondent's testimony, the Court took testimony from three supporting witnesses. Dr. Black and Mr. Samuel Hilton, two of the Government's witnesses, did not testify at the March 27, 2007, hearing.

### C. Government's Submission Regarding Petition for Alien Relative (Form I-130) Filed on Respondent's Behalf

On April 19, 2007, the Government filed a written submission informing the Court that the United States Citizenship and Immigration Services ("USCIS") denied the Petitions for Alien Relative (Form I-130), filed on the Respondent's behalf by his United States citizen wife and child. *See* Exhibit 21. USCIS denied both Petitions on the grounds that supporting documents submitted by the Respondent's petitioning relatives were parish documents issued by local churches in Poland rather than by local civil authorities. *Id.* USCIS concluded that such documentation was insufficient to establish evidence of the petitioning relatives' relationships to the Respondent. *Id.*

The Govemment then summarized an April 17, 2007, telephone conversation between the parties, wherein the Respondent informed the Government that he would not appeal USCIS' decision and conceded that the denial rendered him ineligible for adjustment of status absent a waiver under INA § 237(a)(1)(H). *Id.*

Finally, the Government argued that the Respondent must establish, by a preponderance of the evidence, that he did not assist inNazi persecution to prevail upon his application for a waiver under INA § 237(a)(1)(H). *Id.*

### D. Government's Statement Concerning Respondent's Eligibility for a Waiver Pursuant to INA § 237(a)(1)(H)

On April 19, 2007, the Government also submitted a statement concerning Respondent's eligibility for a waiver under INA § 237(a)(1)(H) and summarizing the respective burdens of proof. *See* Exhibit 22. Specifically, the Government asserts that, in its Prehearing Memorandum, it has established a *prima facie* case that the Respondent is barred from applying for relief under INA 237(a)(1)(H) as an individual who assisted in Nazi persecution and was otherwise inadmissible to the United States at the time of his entry. *See id.* Given this *prima facie* showing, the Government further asserts that the Respondent now bears the burden of proof and must demonstrate, by a preponderance of the evidence, that he did not assist in Nazi persecution, is otherwise admissible to the United States, and is eligible for discretionary relief. *See id.*

### 5. Respondent's Application for a Waiver Pursuant to INA § 237(a)(1)(H) and Supporting Documentation

On April 26, 2007, the Respondent submitted documents in support of his application for a waiver, including a brief, a psychiatric evaluation, medical records for his wife, Vladislava Zajanckauskas, and a *curriculum vitae* for Dr. Brandon Z. Erdos. *See* Exhibit 23.

Ms. Zajanckauskas' medical records contain evidence of an August 17, 2005, outpatient consultation at Saint Vincent Hospital in Worcester, Massachusetts, for acute Lyme disease. *Id.* The records also reflect treatment at the Orthopedics Institute of Central Massachusetts on May 12, 2006, for injuries that resulted from a fall. *Id.* On August 28, 2006, Ms Zajanckauskas was admitted to Saint Vincent Hospital following a second fall. *Id.* This fall resulted in injuries that required outpatient consultations throughout the fall of 2006 and the winter of 2007. *Id.* On February 1, 2007, Ms. Zajanckauskas was examined at the New England Eye Center for a subdural hematoma that occurred during the August 2006 fall. *Id.*

The Respondent's brief concedes that he bears the initial burden of proof regarding eligibility for relief under Section 237(a)(1)(H) of the Act. *Id.* However, the Respondent argues that the Government bears the burden to prove the application of any of the statutory bars to relief. *Id.* Only if the Government meets its burden regarding the application of the bar to relief can the burden of proof shift to the Respondent. *Id.*

Citing the Ninth Circuit's decision in *Alvarado v. Gonzales*, 449 F.3d 915, 930 (9th Cir. 2006), and Justice Brennan's concurrence in *Kungys v. United States*, 485 U.S. 759, 783 (1988), the Respondent argues that the Government must prove the application of the statutory bar by evidence "sufficient to raise an inference" that the bar applies. *Id.* The Respondent asserts that if the evidence "simply raises the possibility that a disqualifying fact might have existed," the Government has failed to meet its burden. *Id.* The Respondent further asserts that, in meeting its initial burden concerning the statutory bar, the Government must establish "individual accountability" for persecutory acts. *See Alvarado* at 926, *quoting Vukmirovic v Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004). According to the Respondent, "mere acquiescence or membership in an organization" does not raise an inference that the statutory bar against persecutors of others applies. *See Alvarado* at 926.

### 6. Government' s Motion to Cancel the May 18, 2007, Hearing

On May 3, 2007, the Government submitted a Motion to Cancel the May 18, 2007, hearing, and to set a briefing schedule. *See* Exhibit 24. The Court granted the Government's Motion and set a briefing deadline of June 18, 2007, for both parties. *Id.*

### 7. Respondent's Proposed Findings and Rulings

On June 18, 2007, the Respondent submitted Proposed Findings and Rulings concerning his application for a waiver under INA § 237(a)(1)(H). *See* Exhibit 25.

### A. Proposed Findings

The Respondent proposes that the Court make five main findings concerning his army activities and his time and activities at the Trawniki Training Camp. These proposed findings are summarized below:

The Respondent proposes that the Court should find that he "enlisted the Lithuanian Army" on May 1, 1939, and "served as a radio operator and later as an aide to a retired general." *Id.* He proposes a finding that he became part of the Soviet Army when that Army "forcibly annexed" Lithuania and its army, as well as a finding that, "[o]n July 10, 1941, they were captured by the German Army." *Id.* He proposes that the Court should find that he was taken prisoner, that he was transferred to the Hammerstein POW camp, that conditions in German POW camps were "brutal," and that he "thought he would die at Hammerstein." *Id.* He proposes that the Court should find that he was beaten at Hammerstein, transferred to a farm, returned to Hammerstein, and then "taken out of the camp" without being "told where he was being taken nor given a choice whether to stay or go." *Id.*

The Respondent also proposes that the Court should find that he arrived at the Trawniki Training Camp on July 23, 1942, where he "was given papers to sign, although he did not know what he was signing because the papers were in German and [he] read little German." *Id.* He proposes that the Court should find that he trained at Trawniki for five weeks, but that he "was not at Trawniki of his own volition." *Id.* The Respondent asserts that "[d]esertion was not an option considering the consequences," which he claims included execution "in front of other Trawniki men." *Id.*

The Respondent proposes that the Court should find that, at the end of his guard training, he was transferred to the Trawniki canteen, where he had separate living quarters and "did not have much interaction with fellow prisoners." *Id.* He proposes a finding that, as a result of his knowledge of Polish, his responsibilities included travel into the town of Trawniki to exchange Schnapps or candy for canteen supplies. *Id.* He states that he "was able to translate

German" to the Polish-speaking women who worked at the canteen. *Id.* He notes that he met his current wife during his trips into the town of Trawniki. *Id.*

The Respondent proposes that the Court should find that he "worked continuously in the canteen from the end of his training until Trawniki was evacuated in July of 1944." *Id.* He concedes that he is collaterally estopped from arguing that he was not detached to Warsaw on or about April 17, 1943, but he asserts that "[t]here is no evidence ... upon which to base a finding regarding [his] role in Warsaw." *Id.* He argues that, given his role "in the officers' canteen prior to and after the Warsaw detachment, it is likely that he would have served in that capacity in Warsaw as well." *Id.*

Although the Respondent concedes that he was promoted three times between 1942 and 1944, from Wachmann to Oberwachmann on October 10, 1942; from Oberwachmann to Gruppenwachmann on January 21, 1943; and from Gruppenwachmann to Zugwachmann "[e]xactly one year later," he proposes that the Court should find that there is "no evidence explaining why [he] was promoted," because "the Germans promoted people on the staff platoon . . . for simply performing their staff duties." *Id.*

The Respondent proposes that the Court should find that, in July of 1944, as the Soviet Army began its advance into Poland, the Trawniki camp was evacuated, and the Respondent "was attached to what became known as the SS Streibel Battalion." *Id.* He notes that his daughter was born in Zlota, Poland, during the Battalion's retreat. *Id.* He proposes that the Court find that he "worked in the kitchen during the retreat" and, on one occasion in February of 1945, "helped to bury the bodies of civilians killed during allied bombings." *Id.* He claims that "[t]here is no evidence of what tasks, if any, he performed" during the retreat, but he argues that his service in the Streibel Battalion cannot have formed the basis for the decoration he received, because Dr. Peter Black testified that the decoration was "'in the works'"while the Respondent was at Trawniki. *Id.*

The Respondent's remaining proposed findings concern his family and his life in the United States. He proposes that the Court make the following findings: (1) that he has lived in Worcester, Massachusetts, since 1950; (2) that his "entire family" lives "within a mile"of him; (3) that he "has lived a law abiding life and has no criminal record; (4) that he "is held in high regard by those in the community"; (5) that he and his wife have "significant medical problems"; (6) that his wife's psychiatric evaluation indicates that she suffers from Post-Traumatic Stress Disorder and the early symptoms of Alzheimer's disease; and (7) that his wife would return to Lithuania, at significant risk to her health and well-being, if the Respondent were ordered removed from the United States. *Id.*

### B. Proposed Rulings

The Respondent proposes that the Court should rule that he is eligible for a waiver under INA § 237(a)(1)(H). *Id.* He notes that he fulfills the first eligibility requirement because it is uncontested that he is the spouse and parent of United States citizens. *Id.; see* INA § 237(a)(1)(H)(i)(I). He argues that he was also admissible to the United States at the time he was admitted, but for the fraud or misrepresentation that serves as the basis for his waiver application. *See* INA § 237(a)(1)(H)(i)(II).

Citing *Matter of Sosa-Hernandez,* 20 I&N Dec. 758, 760-60 (BIA 1993), the Respondent claims that his war time whereabouts, status as a Trawniki man, and attachment to the Streibel Battalion cannot demonstrate that he fails to meet the requirements of INA § 237(a)(1)(H)(i)(II). *Id.* He reasons that he can receive adjustment despite his dishonesty concerning these issues because the purpose of INA § 237(a)(1)(H) is to allow applicants to waive the fraud underlying their visa applications. *Id.* Given this reasoning, the Respondent likens his circumstances to matters in which aliens could obtain waivers after gaining admission via fraudulent marriages, even when they entered the fraudulent marriages to conceal additional grounds of inadmissibility. *Id., see, e.g., INS v. Errico,* 385 U.S. 214 (1966); *Matter of Manchisi,* 12 I&N Dec. 132 (BIA 1967).

The Respondent further proposes that the Court should rule that the bar to Nazi persecutors is inapplicable. *Id.* He reiterates the argument contained in his April 26, 2007, submission concerning the allocation of burdens and the merits of his application for a waiver and cites *Castaneda-Castillo v. Gonzales,* – F.3d –, 2007 WL 1491870 (1st Cir., May 23, 2007), as an example of a case in which the burden of proof shifted to the alien to prove that a bar to relief was inapplicable. *Id.* However, he notes that this burden shifted only after the Government demonstrated that the alien was personally posted outside of a village to secure escape routes during a massacre. *Id.* He claims that, in his case, the burden should not shift back to him because the Government "has presented *no* *evidence* that [he] was an armed guard at Trawniki or Warsaw" (emphasis in original). *Id.* He asserts that the detachment order provides inadequate evidence of his service as an armed guard, because he could have been detached to Warsaw as a canteen worker. *Id.*

Finally, the Respondent argues that he merits a waiver under INA § 237(a)(1)(H) in the exercise of discretion because he is ninety-one years old, has been a resident of the United States for over fifty seven years, has never run afoul of the law, and has shown good character by demonstrating employment history and support among members of the community. *Id.* He also argues that he merits a favorable exercise of discretion because he and his wife suffer from ill health. *Id.* He asserts that his misrepresentations "should not be considered in determining whether to grant the waiver because that act is what the waiver clears." *Id.* The Respondent argues that his misrepresentations would constitute particularly inappropriate discretionary factors because he was granted immunity for those misrepresentations in exchange for his testimony against Liudas Kairys. *Id.*

### 8. Government's Closing Brief

The Government submitted its Closing Brief on June 18, 2007. *See* Exhibit 26. In this Brief, it argues that it has presented substantial evidence that the Respondent is "statutorily prohibited from relief from removal" under INA § 237(a)(1)(H). *Id.*

Citing 8 CFR § 1240.8(d)(2007) and *Abdille v. Ashcroft,* 242 F.3d 477, 491 (3d Cir. 2001), the Government argues that the Respondent bears the initial burden to show eligibility for relief. *Id.* He also must show that none of the relevant bars to relief apply, once the Government has presented "some evidence" favoring the application of a bar. *Id.* Citing case law from the Third, Sixth, Seventh, and Eighth Circuits, the Government argues that it need not prove that the Respondent personally committed individual, identifiable acts of persecution in order to show that the statutory bar applies. *Id.* Given this standard, the Government argues that it well exceeded its burden to present some evidence that the Respondent assisted in persecution by in the destruction of the Warsaw Jewish Ghetto and engaged in additional acts of persecution by training NCO recruits at Trawniki and serving as a courier for the Streibel Battalion.

The Government asserts that it has met its burden regarding the Respondent's activities in Warsaw by demonstrating that the Respondent was included on a roster of Trawniki men deployed to Warsaw, and that Trawniki men performed cordon duty around the ghetto during the operation. *Id.* It argues that the Respondent was particularly likely to have been involved in the "most heinous atrocities of the operation" because he was a member of the Trawniki NCO Training Course, which committed "terrible crimes." *Id.* The Government argues that the Trawniki Warsaw deployment roster precludes the Respondent's claim of service in a support role in Warsaw, because it lists the Trawniki men deployed in a supportive capacity without including his name. *Id.* The Government notes that the Respondent has offered "no evidence to refute the Government's proof that he participated in the destruction of the Warsaw ghetto other than testifying at his hearing that he was never sent to Warsaw." *Id.* It argues that the Respondent has not shown by a preponderance of the evidence that he worked in the canteen without performing other activities. *Id.*

The Government observes that the Respondent admitted to being trained in persecutory acts, and that evidence shows that he trained others to perform persecutory acts as well. *Id.* It argues that the evidence "far more than 'indicates'" that the Respondent assisted in persecution both at the Trawniki Training Camp and in the SS Streibel Battalion. *Id.* The Government argues that the position of courier, which the Respondent performed during his service in the Streibel Battalion, was a "responsible and dangerous job" that enabled "the unit as a whole to function" and thus constituted assistance in the Battalion's activities, which have been deemed persecutory by Circuit and District Courts. *Id.* The Government notes that the Respondent has given inconsistent testimony concerning his activities during his service with the Streibel Battalion, but that the sum of the evidence shows that the Battalion "impressed Polish civilians into forced labor," while he "assisted the functioning of this Battalion as a courier." *Id.*

The Government argues that the Respondent's evidence "should not be credited" because he presented false and inconsistent testimony to the Court. *Id.* Specifically, the Government cites inconsistencies concerning his account of his treatment at Hammerstein and the reasons for his promotions. *Id.*

The Government also argues that the Respondent is barred from receiving a waiver under INA § 237(a)(1)(H) for the additional reason that he was not admissible to the United States at the time of his entry even apart from the inadmissibility he acquired as a result of his fraud concerning his whereabouts. *Id.* The Government proposes three additional grounds of inadmissibility: (1) inadmissibility pursuant to Section 2(b) of the DPA; (2) ineligibility for a DPA visa under Section 13 of the DPA, and (3) ineligibility for a visa under former Department of State regulations excluding those who "advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of the Axis," 22 C.F.R. § 55.33(j) (1949). *Id.*

Finally, the Government argues that the Respondent does not merit a favorable exercise of discretion. *Id.* The Government notes that he has a history of lying under oath to Government officials," at the time of his admission to the United States and "well afterwards," in testimony and on immigration forms. *Id.* The Government summarizes its argument by asserting that the Respondent is both statutorily ineligible for a waiver under INA § 237(a)(1)(H) and undeserving of such a waiver in the exercise of the Court's discretion. *Id.*

### 9. Government's Reply to Respondent's Proposed Findings and Rulings

On July 3, 2007, the Government submitted a Reply to Respondent's Proposed Findings and Rulings. In its reply, the Government argued that the Respondent had misinterpreted the legal requirements for obtaining a waiver under INA § 237(a)(1)(H) with respect to whether he was "otherwise admissible" to the United States at the time of his 1950 entry.

## II. COLLATERAL ESTOPPEL

The issue of whether collateral estoppel applies in this case was addressed by the Court on February 23, 2007, in response to briefs submitted by the Government and the Respondent. *Exhibit 16*. The ruling of the Court on the Government's motion is attached to this decision as an exhibit and is to be incorporated into the Immigration Judge's decision in this case. *See id*.

## III. TESTIMONIAL EVIDENCE

### A. Respondent

The Respondent was born on December 27, 1915, in Lithuania. On the date of his testimony, he was ninety-one years and three months of age. He was educated through high school, where he spoke Lithuanian and "a little Polish." He learned Polish from "neighborhood kids, Polish people," and from his mother, who "grew up in a Polish family."

The Respondent's father was a bookkeeper in a bank, while his mother was a housewife. During the Respondent's time in high school, two of his uncles and three of his aunts lived in the United States. The Respondent wanted to immigrate to the United States in the late 1930s, but the Lithuanian government told him that he could do so only after serving in the military there for one and one half years.

### 1. Lithuanian and Soviet Army Service

The Respondent served in the Lithuanian army for over one year before the Soviet Union occupied

Lithuania. While he was stationed in Kaunas, Lithuania, he worked in "communication," with telephones and radios. He was then transferred to a "war museum" to write the memoirs of a retired general.

In the spring of 1940, the Soviet Union occupied Lithuania, and the Respondent became a member of the Soviet army. He did not want to become a member of the Soviet army because "all [his] family" had problems with the Soviets, but he was "forced" to enlist. He did not like the Soviets because "they took [his] two brothers," who were "against the Communists," to Siberia, and they arrested his sister to send her to "a big city."

The Respondent was a member of the Soviet army until "July or so" of 1941, when the war between Germany and the Soviet Union began. As a member of the Soviet army, he was stationed at Idrica, which was "south from St. Petersburg" in Russia. He lost the hearing in one of his ears during his Soviet army service, when a "bomb fell down," killing some of his friends. He escaped from the Soviet army while "defending Idrica," but he talked to a friend, who said "'don't go any further.'" He had attained the rank of sergeant at the time of his escape.

### 2. Capture by the German Army

The Respondent was captured by the German army after his escape from the Soviet army, and he asserted that he did not want to be captured. On cross-examination, he claimed that he escaped from the Soviet army, but did not want to desert that army. He explained that what he did was "not desertion, because

[he] ran away from Russia, but [he] wanted to come back and return." When the Court asked him the meaning of desertion, he replied, "It means I don't want to serve any more in the Russian army."

The Germans sent the Respondent to a camp with other Soviet prisoners, transporting him from Russia to Kaunas, Lithuania, in a military truck. This transport took one day. The German officers told the prisoners that they would be required to stay in Kaunas for one night, and then they would be released the next day. The Respondent was "happy" to hear that his release was upcoming. However, he was not released, but instead was kept "in a fort under the ground."

The Respondent told the German officers that he wanted to stay in Lithuania, but they placed him on a train to Germany, to a camp that had "no barracks or anything, just a plain field." He stayed at this camp for two to three weeks. At this camp, "people were hungry." Soldiers threw sandwiches on the ground and "opened fire on [the Respondent's] people" when they dove after the sandwiches. The soldiers shot at the hungry prisoners from the watchtowers.

The Respondent was transported through four POW camps in total. On cross-examination, he testified that he did not know if Nazi camp authorities also transported Jews, Roma, and priests from camp to camp in a similar manner.

The last camp, where he arrived in late 1941, was called Hammerstein. "Different kinds of people" – Lithuanians, Polish nationals, Russians, and Estonians – "were all in the same prison" at

Hammerstein. At Hammerstein, the Respondent was given new blue clothes after two or three weeks to replace his Lithuanian army clothes.

The Respondent claimed that he was not treated well at Hammerstein. Soldiers there shot or pushed prisoners and called them dogs. The Respondent characterized Hammerstein as a "death camp," and he asserted that some members of the Soviet army died there. He also asserted that prisoners were beaten at Hammerstein. He claimed that, on one occasion, the officers told him and a friend to remove their pants, and whipped them while another German officer walked by and yelled. The Respondent's friend "died out there, but somehow [the Respondent] survived."

When questioned on cross-examination, the Respondent testified that he did not remember whether, during the District Court proceedings against him, he had testified that he was not hurt at the Hammerstein camp. He stated that he meant to say that, at Hammerstein, his "fellow prisoners" did not hurt him, but "Germans harmed everybody, not only [him]." He claimed that he mentioned discipline at Hammerstein prior to his testimony in removal proceedings, but he did not remember if he mentioned it in Court. He asserted that, while he was at Hammerstein, he wanted to escape. German soldiers "decided to make police out of prisoners" there, and at one point, they asked the Respondent to become a member of the Hammerstein police force.

### 3. Training at Trawniki Camp

The Respondent left Hammerstein for two or three months, and then returned there for two weeks. After this two-week period, the German soldiers took him in a truck to a railroad station. They did not ask him if he wanted to leave, but they placed him on a railroad car. He believed that he was going back to Russia, and he was afraid because he thought he was being exchanged for other prisoners. However, he was sent instead to Trawniki, Poland. He asserted that he did not want to go to Trawniki, but he was forced to sign some documents in German that he did not read. He asserted that he did not volunteer for German military service.

At Trawniki, the Respondent remained in the barracks for four to five weeks, learning German military commands, such as "turn left, turn right." He asked if he could leave Trawniki and return to Lithuania, but "they said no." On cross-examination, he noted that the German military killed "three guys who tried to escape" from Trawniki.

On cross-examination, he conceded that there were prisoners at Trawniki as well as trainees like himself. He initially claimed that he never saw those prisoners until "the end of [his] being in Trawniki." However, he then stated that he did see a prisoner from the other camp "once in a while." He claimed that he "got to the railroad station," and saw "it" there. He stated that he did not know whether the German soldiers moved the prisoners, and he did not see these prisoners "because that camp was behind us, behind a stone wall." He did not know whether conditions at the other camp, where the Jews were kept, were worse than conditions at Hammerstein had been. At Trawniki, he heard gunfire, which he characterized as "target shooting" along the river. He stated that he did not know if shots were ever fired at prisoners.

After two to three weeks, the Respondent and the other individuals who had been transported from Hammerstein received Russian rifles. They were taught how to put the rifles on their shoulders, but the Respondent was weak, and his rifle fell. When this occurred, he was slapped on the face and sent to the bunker. He was assigned to "run around" carrying five-kilogram bags of sand, and then he returned to the barracks after one half hour. Generally, trainees were slapped and sent to the bunker for exercise when they "did something wrong." People were forced to "lie down, go up," with ten- to fifteen-pound bags of sand.

### 4. Claim of Service in the Trawniki Canteen

After the Respondent completed his training, a policeman took him to the front of the camp and asked him to work in the kitchen or canteen, which was "just for German officers." The canteen was located "right in the front of the camp," in a different area from where the "Trawniki men" ate. The Respondent resided in a small room with a bed, which was located 300 meters from the canteen.

The Respondent testified that be never worked anywhere except at the canteen from the time he completed his training at Trawniki until the time he was evacuated from that camp at the "end of May or start of June" of 1944.

The Respondent claimed that he was never sent to Warsaw, and he affirmed that he remained in the Trawniki canteen from the summer of 1942 to the summer of 1944.

### 5. Promotions

In October of 1942, the Respondent was promoted from Wachmann to Oberwachmann. He denied that the Nazis gave him a stripe for his uniform after this promotion, although he conceded that, in the District Court proceedings, he claimed to have obtained the stripe. He then asserted that he did not know why he got the stripe. He did not know whether Germans at Trawniki gave promotions for no reason.

The Respondent was promoted from Oberwachmann to Gruppenwachmann in January of 1943. He did not receive a stripe at the time of this promotion, and he asserted that he did "nothing" to merit the promotion. He merely "worked same place, same thing."

The Respondent did not remember whether he was promoted from Gruppenwachmann to Zugwachmann in January of 1944, but he stated that "it could be" that he was promoted at that time.

During his period of work at Trawniki, the Respondent received time off at holidays. He was allowed to go into the village of Trawniki when his "boss" told him to obtain eggs there in exchange for Schnapps and candies. The "boss" did not give him German money, and he never had possession of German money during his time at Trawniki. On cross-examination, however, when asked if Schnapps were "as good as money," he replied, "right." He was not concerned that someone would steal the Schnapps from him because there were "no robberies."

The Respondent initially stated that he traveled into the village alone, with no weapons. However, he later claimed that, "at the end, before we left Trawniki, [he] had a pistol." He obtained the pistol from the ammunition room, which was always open. He took the pistol at that time because the "front was very close" to Trawniki. On cross-examination, he asserted that he did not "know if they trusted [him] or not; they let [him] go." He did not know whether the Germans' decision to send him into town with Schnapps, which was as good as money, indicated that they trusted him. He never deserted the German forces during his trips to Trawniki. He asserted that, if he deserted,"all [his] family, they will be shot." He testified that he "didn't care about [his] life," but he did care about his father and mother.

Each of the Respondent's trips into the village lasted for one and one half to two hours. He met his wife during one of his trips into the village ofTrawniki, and he had an opportunity to spend "as long as [he] had time to go out" with her before their marriage. The "boss" gave him permission to marry her, and the couple wed in February of 1944.

### 6. Evacuation from Trawniki

The Respondent "had to load everything from the kitchen" onto a train when he was evacuated from Trawniki with "all married couples and kids." Most of the evacuees were "drivers, electricians," and people who "made the beds and swept" in the German quarters. The Respondent was transported along with his wife, an electrician and Oberzugwachmann named Eugene Adler, and Mr. Adler's wife. The Respondent explained that an Oberzugwachmann like Mr. Adler was more highly ranked than a Zugwachmenn like himself. Thirty others were evacuated at the same time, and this group remained together for six to seven months. The evacuees traveled by train, and "airplanes bombed [them]" throughout the trip. The Respondent attempted to escape from the train and walk into the woods, but the German military trucks apprehended him in June or July of 1944 and "took [them] back, away from the Russians."

The Respondent was transported "every day further and further as the front comes closer." The evacuees lived in other people's homes in villages. They remained at Zlota, Poland, "far away from the front," for two to three months. There, the Respondent's wife gave birth to the couple's daughter; Danuta. During this time, the Respondent worked in the kitchen and cooked for the Germans and "all those people who were retreating."

When the Respondent was asked on cross-examination if he served in the Streibel Battalion after he left Trawniki, he replied that "everyone in Trawniki was in Streibel Battalion." When asked what Streibel Battalion members were doing during the time after they left Trawniki, he replied that he did not know and that they "were all married couples." When the Government asked if the Streibel Battalion had so many soldiers that it did not need the services of the Respondent and Mr. Adler, the Respondent replied that he did not know.

### 7. Awards During German Army Service

The Respondent denied having been recommended for an award during his service with the Streibel

Battalion. The Government showed him the materials at Tab 27 of Group Exhibit 17. These materials indicate that, in September of 1944, he was recommended for a bravery award, second class in bronze, for an individual who has performed in an exemplary manner on duty in service against bandits. The Respondent asserted that he did not remember whether he was recommended for this award. He conceded that he saw the name "Vladas Zajanckauskas" on the list at Tab 27, but he stated, "nobody told me. I don't know nothing about it." When the Government noted that Eugene Adler received a War Achievement Medal on October 2, 1944, the Respondent asserted that he remembered Mr. Adler but did not recall that he had received a medal. He recognized Mr. Adler's name on the list at Tab 27. However, the Respondent did not remember Jakob Reimer, whose name also appeared.

### 8. End of Service With German Army

The Trawniki evacuees approached the German border and arrived in Dresden, Germany, in February of 1945, just before Dresden was bombed. The evacuees "came in on the same day – the afternoon – and the big bombing started at night." After the bombing, the "Germans took [the evacuees] to the city to clear out all dead bodies." The evacuees went to hospitals to look for the dead, then took them in "wagons driven by horses to the cemetery." One hundred twenty thousand bodies were transported to the cemetery, and the evacuees identified and counted them over a two to three week period. The Respondent was discharged from service with the German military in February or March of 1945.

The Respondent claimed that he never fired a gun during his period of service or imprisonment with the German military, although he acted as a courier "one time" in Zlota, delivering a "letter packet" to the city of Yenjaev, Poland.

### 9. Respondent's Time in Austria

After the Respondent's service with the German military ended, he and his wife went to Austria. They "wanted to get somewhere in the West to get in touch with relatives" in the United States. However, the couple spent five years in Bludenz, Austria, as refugees. Their daughter, Danuta, remained with them there.

At Bludenz, the Respondent and his wife completed immigration paperwork with the help of the Lithuanian Immigration Committee. The Respondent listed his occupation as a farmer during the war "because the Lithuanian Immigration Committee says if you work for the Germans, you won't be able to immigrate." On direct examination, he stated that he knew that his immigration document contained false information about his occupation. On cross-examination, however, when asked if he lied and told his lawyer that he was a farmer, he replied, "I was a farmer." He then denied lying on his visa application concerning his occupation during World War II. He stated that he just filled out the papers "they" gave him, because he did not "know nothing about immigration." When asked again if there were any lies on the immigration papers he signed, he replied, "only one paper I signed, and it said I worked on a farm." He again conceded that his claim to have worked on a farm was a lie. When the Government asked the

Respondent, "What was the truth?" he replied, "that I didn't work on a farm."

When asked what he did do, the Respondent replied that he "was in Trawniki." He again stated that he did not tell the truth because the Lithuanian Immigration Committee told him that, "if you worked for Germans, they won't let you come to America."

The Respondent initially stated that he did not think there were any other lies contained in his visa application. However, he then conceded that his wife was born in Trawniki, although his immigration papers indicate that she was born in Trakai, Lithuania, near Vilnius. When asked on cross-examination whether he and his wife said that they would lie to cover up her true place of birth, he responded that the Lithuanian Immigration Committee had told him to "put Trakai." Then, he later asserted that he had listed his wife's birthplace as Trakai because, "in transfer," Trawniki became Trakai. He explained that he did not know the intentions of "people who transfer another language," but he "said Trawniki, and they put Trakai."

The Respondent did not recall his interview with the United States Vice Consul in Austria. He did not recall whether he was interviewed by anyone in Europe, other than the Lithuanian Immigration Committee, concerning his immigration.

### 10. Immigration and Naturalization

The Respondent arrived in the United States with his wife and daughter in 1950. He recalled applying for United States citizenship. He testified that he did not lie during this application process because "no one asked us any questions." Instead, he asserted, he and his wife were called and instructed to "come to Front Street in Worcester, sign some papers." The information on the papers, such as his name and his wife's name, was printed, and the Respondent did not know who had printed the information. He claimed that "they got information from Europe" in support of his naturalization. He denied reading the information on the papers before he signed them, stating that he "trusted they put the right information." He asserted that the process took "a few minutes," and he claimed that he and his wife were not interviewed by an immigration official at that time.

### 11. Employment, Religion, Family, and Health in the United States

When the Respondent first arrived in the United States, he lived in Worcester, Massachusetts, with his uncle. He worked in the kitchen at a college preparatory school for three or four months, and his wife did not have a job at that time. Then, he worked as a driver for Dapol, a company that made plastic toys and housewares. He transferred to Dapol's manufacturing plant, and he worked there for thirty-five years. He began his work there as a machine operator, then became an "assistant foreman, then foreman, then, after a couple of years, assistant superintendent." As assistant superintendent, he supervised over two hundred people.

The Respondent worked with blow-molding machines for two or three years after he left Dapol. He was employed until 1983, when he was sixty-eight years of age.

The Respondent attends Saint Mark's Church in Sutton, Massachusetts, where he has been a parishioner since 1975, when he moved to Millbury, Massachusetts. He was a Catholic in Lithuania, and he continued to attend church in Austria and the United States. When he lived in Worcester, he went to church in a different parish.

The Respondent now lives on his daughter's property. Danuta uses the name Diane in the United States, and she is married to a man named Paul Lavoie. She and Mr. Lavoie have three children: Denise, Steven, and Nicole. The Respondent has four great-grandchildren. Diane and Paul Lavoie live on the first floor of the large house on their property, while Nicole lives on the second floor. The Respondent and his wife live in the smaller house on the property. Denise lives on the same road, Miriam Lane, while Steven lives approximately one mile away from the rest of the family. The Respondent's family is close, and they get together "every day, especially on weekends."

The Respondent testified that he suffers from a variety of physical problems. His spleen, gall bladder, and testicles have been removed, and he suffers from prostate problems. He takes medication, such as cumidin, but he "can't take too much," and he has "to go to the doctor almost every month and check" his medication levels. His wife suffers from medical problems as well, including high blood pressure. She had a "very bad accident" at one point, and spent one month in a hospital undergoing rehabilitation. She fell down the stairs of her home, from the second to the first floor. She broke her arm and her hips, and now she takes medication and walks with a walker. The

Respondent administers her medication and puts her pills in "each compartment." He does not "think she could survive" if he were removed to Lithuania. Neither the Respondent nor his wife has returned to Lithuania or Poland since 1950.

When the Court asked the Respondent if he remembered testifying in the District Court that he would lie to remain in the United States, the Respondent asserted that he did not "remember [his] answer." When the Government showed him the relevant portion of the District Court transcript, he conceded that he thought he had said that he would lie to remain in the United States. However, he argued that this answer did not mean that he had, in fact, lied. On redirect examination, he claimed that he was not lying before the Immigration Court.

### B. Testimony of Respondent's Wife, Vladislava Zajanckauskas

#### 1. Marriage and Evacuation from Trawniki, Poland

Ms. Zajanckauskas was born in Trawniki, Poland. She did not answer multiple questions on direct examination concerning her date of birth. She met the Respondent in 1943, when she was seventeen or eighteen years old. She recalled that "they have a street and they hang around," and her older brother, Stefan, heard the Respondent "talking Polish." Stefan brought the Respondent "home to our house," and Ms. Zajanckauskas "liked him." The Respondent visited her house regularly, "but it wasn't because of [her]." Rather, he "was friends with [her] brother." "Little by little," she and the Respondent "fell in love," and they "got married in 1944."

Ms. Zajanckauskas left Trawniki with the Respondent, Gertrude Adler, and "another couple, was Russian." They left Trawniki "because Russians were coming." Ms. Zajanckauskas knew Ms. Adler because they lived in the same house in Trawniki, and her husband worked with the Respondent. Mr. Adler worked with "electric stuff."

Ms. Zajanckauskas and the Respondent "were in Czechoslovakia for a couple of days" after they left Trawniki. They got "further and further away" from Trawniki until they arrived in Germany. Their daughter, Diane, was born in Zlota, Poland, while they were there for a "few months."

The family was taken to Dresden, Germany, and they were "supposed to stay in the city, and at some point they changed their minds and told [the family] to go to the village three miles away." Ms. Zajanckauskas became distressed as she testified about her time in Dresden, because "there was a bombing" and "they had to stay and clean up the dead."

### 2. Visa Application and Birth Certificate

After Ms. Zajanckauskas and the Respondent left Dresden, they stayed in Austria for five years. They completed the papers to come to the United States while they were in Austria. Ms. Zajanckauskas asserted that the papers contain her correct date of birth, although she could not read the purported birth certificate contained in Group Exhibit 18, because she cannot read Lithuanian. She testified that she "didn't know when [she] was born" and that she "didn't have a certificate." She asked for a certificate "later." When she read the translation of the birth certificate, she confirmed that it contained her correct date of birth and her mother's correct name, but that her father's name was "not right." She acknowledged that the birth certificate indicated that she had been born in Trakai, not in Trawniki. She explained that Traikai is "in Lithuania, a Lithuanian town, I guess."

Ms. Zajanckauskas conceded that she had "probably"seen the birth certificate in Group Exhibit 18 before, but that she "didn't read it." The Respondent prepared the certificate for her. He told the makers of the certificate that she had been born in Trakai, "but they told him to do it."

### 3. Arrival in the United States and Application for Citizenship

The couple came to the United States in 1950. They lived with the Respondent's uncle "for awhile, and then [they] got here a job."

Ms. Zajanckauskas testified on direct examination that she applied for citizenship in the United States from Austria, and "there was a guy who helped [them]." He told Ms. Zajanckauskas that she would "have to sign something," but she did not remember the contents of the papers that she signed. On cross-examination, she acknowledged that she in fact applied for United States citizenship in 1956, at the same time as the Respondent. She completed the naturalization paperwork along with the Respondent, but she did not remember whether she read the necessary forms before signing them. She did not remember whether she signed the forms at the same time as the Respondent, but she knew they each signed the forms on the same day. She knows that they signed the forms on the same day because they "went together" to complete the forms.

Ms. Zajanckauskas acknowledged that her naturalization forms indicate that she was bom in Trakai Town, not in Trawniki. She conceded that she was not born in Trakai, but she explained that the informtion on the naturalization application "was from before [she and the Respondent] came here." She asserted that they "had to put it the same like our papers was." When asked to clarify, she replied, "when we came to America, [the Respondent] went to a place where they are making papers, and they told him to" indicate that she had been born in Trakai. She affirmed that the Respondent had taken care of the application process. Ms. Zajanckauskas did not know whether the Respondent was responsible for the misrepresentations on her visa and naturalization applications, because she "wasn't with him" when he completed the visa application.

Ms. Zajanckauskas stated that she did not remember her naturalization interview, but she also testified that "they asked us if we wanted to change the name because it was too long." She acknowledged that she had sworn to the contents of her application.

### 4. Employment, Family, and Health in the United States

When Ms. Zajanckauskas' daughter, Diane, got older, Ms. Zajanckauskas built parts for the United States military, working "with Wright's Machines" for three years. Then, she got a job stitching at Paul's Hats, where she worked for twenty-eight years. While Ms. Zajanckauskas worked at Paul's Hats, she and the Respondent moved out of the Respondent's uncle's house and into a "three-decker" house in Worcester, Massachusetts. They rented a portion of the house for some time, and then sold the house to Diane. After they sold the house in Worcester, they moved to Millbury, Massachusetts, and lived there for a "long time." They moved to a house on Diane's property three or four years ago.

Ms. Zajanckauskas has no children except Diane. She has three grandchildren: Denise, Nicole, and Steven. Nicole lives "in the same house, downstairs," with Diane. Denise lives "close to [the Respondent and Ms. Zajanckauskas]," within "a mile or something." Steven "lives a little further." Ms. Zajanckauskas sees her great-granchildren a lot. She sees her great-grandson, Travis, who is thirteen years old, "once a week or twice a day sometimes." He "wants to help" her with her health problems. The family gets together often, as they come to see her for supper.

Ms. Zajanckauskas takes medication for high blood pressure and high cholesterol. She has broken her wrist, her foot, and her hip in various falls. She "fell from the second floor ... two or three months" ago. She went to the hospital following the fall, and then she moved to a nursing home and rehabilitation center. The Respondent visited her there every day. The Respondent takes care of her at home by helping to wash dishes and clothes. The couple cooks together. Their grandchildren do not provide much help to Ms. Zajanckauskas "because [she does] it and [her] husband does it now." However, Ms. Zajanckauskas' grandchildren do "shovel the snow."

Ms. Zajanckauskas has never been away from the Respondent during the past fifty years, and she does not know what she would do if he were removed to Lithuania. She does not know whether she would choose to accompany the Respondent to Lithuania, and does not "think they would let [her] go with him."

### C. Testimony of Respondent's Daughter, Diane Lavoie

#### 1. Immigration to the United States

Ms. Lavoie testified that she was born on August 22, 1944, in Zlota, Poland. She came to the United States "by ship." On the ship, she remembers her "mother getting sick in wherever they have the beds," and she remembers getting food for her mother. Her father, the Respondent, was on the ship as well, but he was not with Ms. Lavoie and her mother because he had a job on the ship.

#### 2. Family Relationships

Ms. Lavoie recalls the period after the family first arrived in the United States "a little bit." They lived "on Millbury Street in Worcester with [her] father's uncle" for "maybe a couple of months." They were a close-knit family. They moved to a "six-tenement building" on Ward Street in Worcester and stayed there "until [she] was about twelve, junior high age." Then, they bought "a three-decker on Granite Street in Worcester." Ms. Lavoie has no siblings.

Ms. Lavoie believes that the Respondent was "the best father anybody could ever have" and that "he was great." He was "the patriarch, the elder, the one that's most respected" for "his opinions, his love." She was and is close to him. When problems arose, she took them to him, "because he's the sensible one." He worked at Dapol Plastics, eventually attaining the position of superintendent. "They loved him" at Dapol Plastics, and he worked there "until he retired."

In 1960, Ms. Lavoie married a man named Paul and lived on the second floor of her parents' home. The Lavoies rented this floor, while Ms. Lavoie's parents lived downstairs.

Mr. and Ms. Lavoie moved to Central Turnpike in Sutton, Massachusetts, in 1973, but Ms. Lavoie's parents had moved from the three-decker before that time. Ms. Lavoie's parents bought "a little ranch in Millbury" after they left the three-decker. However, the Lavoies continued to visit them "all the time, a few times a week and definitely every Sunday." During the time they lived in the three-decker, the Lavoies had three children: Denise, Nicole, and Steven.

The Lavoies had meals with Ms. Lavoie's parents and spent the holidays with them. The Lavoies' children played in both the Lavoie and Zajanckauskas households. Ms. Lavoie now lives on the same property as her parents. Her parents live in "a little cottage ... right off our driveway."

Ms. Lavoie's daughter, Nicole, also lives on the same property, in a "temporary apartment" where she has resided for ten years. Ms. Lavoie's other daughter, Denise, now lives with her husband, Jack, and her stepdaughter on Miriam Lane in Sutton, "a matter of so many hundred feet maybe" from Ms. Lavoie's home. Ms. Lavoie's son, Steven, lives on Putnam Hill Road, "about a mile away from [Ms. Lavoie's] house."

Denise, Nicole, and Steven visit the Respondent "several times a week, sometimes several times a day." Their children visit the Respondent as well. The Respondent's grandchildren and great-grandchildren help around the house with chores. They help Ms. Zajanckauskas "with some things." However, only Ms. Lavoie drives the Respondent and Ms. Zajanckauskas to their medical appointments.

Ms. Lavoie cannot recall a time when her mother and father have been apart. They never take trips separately. Ms. Lavoie's mother fell down a flight of stairs and broke her wrist, rib, and nose. The fall "left her with double vision" because "she had fluid in her brain from the fall." The fluid is "gone, but she still had retained the double vision." She had fallen and fractured her back on a previous occasion, and prior to that fall, she "fell and fractured her ankle." She also suffers from health problems such as high blood pressure and high cholesterol, and she is "very nervous." Ms. Lavoie is concerned about leaving her mother alone, because the Respondent is "always with her." He "makes sure she takes the correct medication, how much she takes each day, when she's supposed to take it." However, Ms. Lavoie "bring[s] them to the dentist and eye visits and all of that."

### 3. The Respondent's Reputation

The Respondent is "well-respected and well-liked" by reputation. He gets along with his neighbors.

Indeed, the neighbors were “upset” when this “incident”regarding his denaturalization arose a few years ago. They would “put their arms around” Ms. Lavoie and ask her if there was anything they could do.

Ms. Lavoie testified that the Respondent has a “deep respect for life and nature.” He has “faith in God and love in God,”and this faith “helped him get through” his denaturalization. His faith persuaded him “not to give up on the goodness in man.”

On cross-examination, Ms. L.avoie affirmed her belief that the Respondent is an honest man, although she was aware that he admitted to falsifying his application to the Displaced Persons Commission, providing false information concerning Ms. Zajanckauskas’ date of birth, and providing a false birth certificate for Ms. Zajanckauskas. When the Government asked whether she was aware that he admitted that he lied on his 1956 application for naturalization, Ms. Lavoie replied that she did not “remember every specific thing, but if he said that, [she was] aware of it.” Ms. Lavoie did recall that the Respondent testified that he would lie to stay in the United States. However, she was “not sure if he understood that question” before he answered.

Ms. Lavoie believes that “it would be devastating” to the Respondent’s family if he were removed. She also believes that it would be “devastating for him.” She believes that “he would just want to die,” particularly at his age. If the Respondent were removed, Ms. Zajanckauskas would suffer from “psychological and emotional trauma” as well. The family has never discussed what they would do with Ms. Zajanckauskas if the Respondent were removed.

## D. Testimony of Respondent's Granddaughter, Denise Lavoie-Ronayne

### 1. Family Relationships

Ms. Lavoie-Ronayne was born on December 11, 1960. She is forty-six years old. Her earliest memory of the Respondent involves "riding around on his foot" when she was "one or two" years of age. The Respondent and Ms. Zajanckauskas were "like [Ms. Lavoie-Ronayne's] second parents." She saw them "every single day" during the ten-year period when she lived on the floor above them in a three-decker home.

The Respondent and Ms. Zajanckauskas "moved first" from the three-decker home, and the Lavoie family "moved right around the same time." The Respondent and Ms. Zajanckauskas "moved to Millbury," while the Lavoies moved to Sutton, Massachusetts. Ms. Lavoie-Ronayne explained that Millbury and Sutton are "neighboring towns." Even after the move, the Lavoies and the Zajanckauskases spent "all summer living together, the whole family." The experience resembled "summer camp, every year, twenty-four-seven."

Ms. Lavoie-Ronayne remained at her family's home in Sutton "all [her] life until [she] was twenty two maybe." She "did a little bit of going to college and coming home," and then "moved to Worcester at twenty-two or twenty-three." She lived in Worcester, Massachusetts, for "a few years,"and during this time, the Respondent and Ms. Zajanckauskas "used to come over to [her] apartment and help [her] clean it." Throughout her life, she saw them "standardly [sic] for Sunday dinners."

Ms. Lavoie-Ronayne has been married for twenty years and has a stepdaughter from her husband's first marriage. She and her family live "right down the street" from the Respondent and Ms. Zajanckauskas. Ms. Lavoie-Ronayne walks to her grandparents' house "probably three to four times a week." She testified that her husband and stepdaughter were "at home praying for" the Respondent during his March 27, 2007, removal hearing.

Ms. Lavoie-Ronayne's siblings each have two children. Thus, Ms. Lavoie-Ronayne has two nieces and two nephews, who range in age from five to twelve. These children are "extremely close" to the Respondent. They "visit him every day as soon as they get off from school. As a matter of fact, about half the time," the Respondent "picks them up" from school.

Ms. Lavoie-Ronayne's uncle, Steven, lives less than one mile away from her home. Her aunt, Nicole, lives on the same property as the Respondent and Ms. Zajanckauskas.

The Respondent is "the character role model of the family." Ms. Lavoie-Ronayne has never seen him raise his hand to anyone or act cross with anyone. When a dispute arises in the family, "he sits you down and goes on and on about the attributes" of the other party to the dispute "until you're not mad at them anymore." Because he cooks often, Ms. Lavoie-Ronayne and her family are "always over their house eating."

The Respondent and Ms. Zajanckauskas are "never" apart, even for trips and holidays. They are not apart at significant family events. They have never been apart for "even a day unless [Ms. Zajanckauskas] is in the hospital." When she is in the hospital, the Respondent visits her "every day."

### 2. Respondent's Character

Ms. Lavoie-Ronayne testified that the Respondent's neighbors knew that "he was the one who would go out on a limb for them." Ms. Lavoie-Ronayne recalled that, after his denaturalization proceeding began, reporter's "couldn't find one person who had a bad thing to say about him." However, she acknowledged that, at the time the reporters approached these neighbors, the neighbors did not know about his service at Trawniki or in the Streibel Battalion, although "they know now." She did not know whether, at the time the reporters investigated, the neighbors knew that the Respondent had served at Trawniki on November 3, 1943, the date when six to eight thousand prisoners were murdered. She did not know whether the neighbors knew that he had committed perjury. However, the neighbors are now aware of the charges against the Respondent, and Ms. Lavoie-Ronayne claimed that they remain supportive of him.

Ms. Lavoie-Ronayne characterized the Respondent as "quiet, offering you cucumbers and tomatoes all the time." He and Ms. Zajanckauskas "had a garden, and that was [the Respondent's] life." Ms Lavoie-Ronayne believes that he is a "nurturer." She noted that her parents were "very young when they got married," so she spent "a lot of time with them, my grandparents."

### 3. Potential Consequences of Respondent's Removal

Ms. Zajanckauskas has fallen three times "since this trial" began. Ms. Lavoie-Ronayne "has seen them both deteriorate since the trial." Ms. Zajanckauskas "went to the gym" before the trial, but she has stopped doing so since the denaturalization proceedings began. Meanwhile, the Respondent "has a heart condition" and "has a pig valve in his heart." The valve "only had a life expectancy of fifteen years ... and it's way beyond its time." Since the denaturalization proceeding began, the Respondent has become "very weak ... very pale... dizzy and faint all the time." Ms. Lavoie-Ronayne often finds the refrigerator at her grandparents' house empty of food. Ms. Lavoie-Ronayne's mother takes the couple to their doctor's appointments.

Ms. Lavoie-Ronayne believes that, if the Respondent were removed to Lithuania, "it would be the last time we see him." She does not believe that either the Respondent or Ms. Zajanckauskas "would make it." She does not "even think that they would make it over there."

## IV. CREDIBILITY AND CORROBORATING DOCUMENTATION

The Court concludes that the Respondent is not credible. In making its credibility determination, the Court applies the standards enunciated in the REAL ID Act, because the Respondent filed his applications after that Act's May 11, 2005, effective date. See Pub L. 109-13, 119 Stat. 231; *see also Matter of S-B-*, 24 I & N Dec. 42 (BIA 2006).

### A. Credibility and Corroborating Documentation

Under the REAL ID Act, the Court will make its credibility determination "[c]onsidering the totality of the circumstances, and all relevant factors," including "the demeanor, candor, or responsiveness of the applicant..., the inherent plausibility of the applicant's... account, the consistency between the applicant's... written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which such statements were made), the internal consistency of each statement, the consistency of such statements with other evidence of record, ... and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor." INA § 240(c)(4)(C).

An applicant's testimony may be sufficient to sustain his or her burden of proof without corroborating evidence, but only if the applicant establishes that his or her testimony is credible, persuasive, and refers to specific facts sufficient to demonstrate that he or she merits relief. INA § 240(c)(4)(C). In determining whether the applicant has met his or her burden, the Court may weigh credible testimony with other evidence of record. *Id.* Where the Court determines that the applicant should provide corroborating evidence, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain such evidence. *Id.*

## B. Determination of the Respondent's Credibility

### 1. Service With the German Military

Although collateral estoppel does not apply to allow the Court to determine the Respondent's precise activities during his service with the German military, the Court concludes that he minimized his service and lied to the Court concerning the crucial fact of his presence in Warsaw, Poland, during the liquidation of the Warsaw ghetto. Although the Respondent confirmed that he was telling the truth in his removal proceedings, this claim is unreliable because he has equivocated under oath in the past concerning his willingness to lie in order to remain in the United States.

First, the Respondent minimized the level of choice involved in his performance of German military service. He testified that he participated in German military activity to only a limited degree, and he claimed that he was forced to join the German army. Contrary to the Respondent's testimony, however, the evidence clearly demonstrates that he participated actively in German military activities by serving in a unit with German police, SS officers, and members of the German military. *See, e.g.*, Exhibit 17, Tab 7 at 0691. Indeed, the Respondent has conceded that just such individuals directed the Trawniki Camp, where he trained. Exhibit 4.

Although he claimed to have been forced into service, his service was not involuntary. To the contrary, he was permitted to travel from the Trawniki camp to the nearby village of Trawniki, while carrying items that were "as good as money." He had access to an open ammunition room. Later in his service, he was permitted to travel there while carrying a pistol and six bullets. *See* Exhibit 17, Tab 1 at 0039. He was allowed to remain in Trawniki long enough to meet and court his wife. He has offered no evidence to substantiate his allegation that his family's life would have been threatened if he escaped from Trawniki. Thus, the Court must conclude that the Respondent's service with the German army was voluntary.

### 2. Treatment at Hammerstein Camp

Second, the Respondent offered inconsistent testimony in this proceeding and before the District Court concerning whether he was mistreated at the Hammerstein camp. Before the District Court, he testified that he was not hurt at Hammerstein, Exhibit 17, Tab 1 at 0022, but before this Court, he characterized Hammerstein as a "death camp." He also offered an account of a whipping he allegedly suffered there during a disciplinary proceeding. He claimed that his companion died as a result of this whipping and that he himself was lucky to have survived. The Respondent did not explain why he would have omitted this information from his testimony before the District Court, and indeed, he did not explain why he would have indicated precisely the opposite in that proceeding. The inconsistency between these oral statements, made under oath, cause the Court to doubt the Respondent's credibility.

### 3. Training and Experiences at Trawniki

Third, the Respondent minimized the length of the training be received at the Trawniki camp. Before this

Court, he testified that he received only four or five weeks of training. Before the District Court, he testified that he trained at Trawniki for six weeks, although he was evasive concerning the portion of the training that occurred outdoors. See Exhibit 17, Tab 1 at 30-31. The inconsistency between the Respondent's testimony in removal proceedings and his testimony before the District Court, taken on its own, might not be fatal to his credibility. However, on October 11, 1950, Vasilij Bronov asserted in his interrogation that the Respondent "was in the training company" at Trawniki "from November 1942 until March 1943." Exhibit 17, Tab 13 at 0821. Mr. Bronov's response, which is rendered credible by its relative proximity to the events of World War II, suggests that the Respondent's training lasted for four months, not for mere weeks, as the Respondent maintained. A difference of this magnitude exerts a significant negative impact on this Court's assessment of the Respondent's credibility.

The Respondent also offered an implausible account of his knowledge of how Trawniki prisoners were treated. The Respondent was not collaterally estopped in this proceeding from presenting evidence that he did not know how the Trawniki prisoners were treated. However, based on the evidence provided, this Court agrees with the District Court that it is "implausible" that the Respondent would have remained unaware of the executions of Trawniki prisoners. The executions occurred in close proximity to where the Respondent claimed to have worked in the canteen, and it is unlikely that, as the Respondent asserts, the stone wall between his camp and the prisoners' camp preserved his ignorance. The Respondent's claim of unawareness in this respect damages his credibility.

### 4. Deployment to Warsaw

Although the Court finds each of the above issues significant, the key credibility issue in this case involves the Respondent's dishonesty concerning whether he went to Warsaw with the Trawniki men. In his testimony, he denied going to Warsaw. However, clear and convincing evidence demonstrates that he was present there with the other Trawniki men.

As a preliminary matter, the Respondent has been collaterally estopped from arguing that he was not present at Warsaw. See Exhibit 16. He may not relitigate the factual finding contained in paragraph 9 of the NTA, which states as follows: "To help accomplish the liquidation of the Warsaw Jewish Ghetto, on April 17, 1943, a battalion of 351 Trawniki men was ordered to Warsaw to participate in the liquidation. You and other members of the NCO [non-commissioned] training course at Trawniki and their trainers were deployed to Warsaw as part of this battalion." *See* Exhibit 1.

However, even if the Respondent were not collaterally estopped from attempting to demonstrate that he was not present in Warsaw on April 17, 1943, the Court would find that he was present in that city at that time. Dr. Black's expert testimony in the Respondent's denaturalization proceeding indicates that men, like the Respondent, who were listed on the roster of Trawniki men deployed to Warsaw, "did in fact participate in the destruction of the Warsaw ghetto." Exhibit 17, Tab 1 at 0553-54. None of the Respondent's family members have testified as to his duties at Trawniki. They have presented no evidence that might establish his whereabouts outside Warsaw on April 17, 1943. While his daughter and granddaughter testified regarding his good reputation in the community and high standing in their family, these facts do not establish his truthfulness concerning the specific time period in question. As such, the Respondent's assertion that he never went to Warsaw prevents him from establishing his credibility before this Court.

The Respondent's assertion that he performed only support actions in Warsaw is also implausible and damaging to his credibility. Dr. Black testified that the roster of Trawniki men deployed to Warsaw explicitly identifies the seven men who were assigned to support positions for the battalion. *Id.* at 0242-43. He affirmed that the Respondent's absence from this list precludes the possibility that he served in a support role in Warsaw. *Id.* As discussed below, the Court makes no finding regarding the specific actions the Respondent performed in Warsaw. Moreover, as discussed in the Court's findings, even logistical support would constitute assistance in persecution when that support was considered in combination with the Respondent's knowledge of the Trawniki men's persecutory activities. The Government has offered clear and convincing evidence of the Respondent's performance of duties that extended beyond logistical support. The Respondent's statements to the contrary in removal proceedings thus render him incredible.

## V. DOCUMENTARY EVIDENCE

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| Exhibit 1 | Respondent's NTA; |

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| Exhibit 2 | Respondent's Motion to Continue and Notice of Entry of Appearance; |
| Exhibit 3 | Government' Opposition to Respondent's Motion to Continue; |
| Exhibit 4 | Respondent's Pleadings; |
| Exhibit 5 | Respondent's Medical Records; |
| Exhibit 6 | Medical Report by Dr. Joseph Binnoti; |
| Exhibit 7 | Department of Justice Submission regarding Countries of Record for Removal Purposes; |
| Exhibit 8 | Department of Justice Submission: Notice of Amendment to NTA and Pre-Hearing Statement; |
| Exhibit 9 | Letter from Stephen J. Paskey, Esq., Dated March 19, 2007, Concerning Error During Teleconference; |
| Exhibit 10 | Pre-Hearing Statement; |
| Exhibit 11 | Respondent's Exhibits, Tabs A-J (admitted as fill exhibits; no Government objection); |
| Group Exhibit 12 | Respondent's Amended Exhibits K-L; |

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| Group Exhibit 13 | Department of Justice Motion for Collateral Estoppel and Judgment as a Matter of Law; |
| Exhibit 14 | Respondent's Opposition to Department of Justice Motion for Collateral Estoppel; |
| Exhibit 15 | Department of Justice Response to Respondent's Opposition to Department of Justice Motion for Collateral Estoppel; |
| Exhibit 16 | Immigration Judge's Written Decision Concerning Department of Justice Motion for Collateral Estoppel; |
| Group Exhibit 17 | Government Submission in Opposition to Adjustment of Status (Three Volumes); |
| Group Exhibit 18 | Copy of Respondent's Wife's A-File; |
| Exhibit 19 for identification | Copy of Respondent's A-File; |
| Exhibit 20 for identification | Translation of Part Three of Exhibit 18 (Purported Birth Certificate of Respondent's Wife); |
| Exhibit 21 | Government Letter to the Court, Submitted April 19, 2007, Indicating That Respondent's I-130 Petition Was Denied by |

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|---|---|
| | USCIS, and That Government and Respondent Had Reached an Agreement Concerning an Issue of Law in an April 17, 2007, Telephone Call; |
| Exhibit 22 | Government's April 19, 2007, Statement Concerning Respondent's Eligibility for a Waiver Under Section 237(a)(1)(H) of the Act; |
| Exhibit 23 | Respondent's Documents, Submitted on April 26, 2007, in Support of His Application for a Waiver Pursuant to Section 237(a)(1)(H) of the Act, Including:<br>(1) Legal Brief<br>(2) Psychiatric Evaluation<br>(3) Medical Evaluation of Vladislava Zajanckauskas<br>(4) *Curriculum Vitae* of Dr. Brandon Z. Erdos; |
| Exhibit 24 | Government's Motion to Cancel May 18, 2007, Hearing; |
| Exhibit 25 | Respondent's Closing Brief, Submitted June 18, 2007; |
| Exhibit 26 | Government's Closing Brief, Submitted June 18, 2007; |
| Exhibit 27 | Government's Reply to Respondent's Closing Brief. |

## VI. STANDARDS OF LAW

An individual who, at the time of his or her entry or adjustment of status, was within one or more of the classes of aliens inadmissible by the law existing at such time is removable, to wit: an individual who is inadmissible for a willful misrepresentation of a material fact for the purpose of gaining admission to the United States INA § 237(a)(1)(A). However, such an individual may apply for a waiver of said ground of deportability if he or she (1) is not described in INA § 237(4)(D) as an individual who assisted or otherwise participated in Nazi-sponsored persecution; (2) is the spouse, parent, son, or daughter of a United States citizen or lawful permanent resident; (3) was otherwise admissible to the United States at the time of entry in question, and (4) merits a favorable exercise of discretion. INA § 237(a)(1)(H).

### A. Burdens of Proof

Generally, an individual who seeks to apply for relief from removal must establish that he or she satisfies the applicable eligibility requirements and merits a favorable exercise of discretion INA § 240(c)(4)(A)(i)-(ii); 8 CFR § 1240.8(d)(2007).

However, if evidence put forth by the government "indicates" that one or more of the grounds for mandatory denial of the application for relief may apply, the individual seeking said form of relief must establish, by a "preponderance of the evidence," that such grounds are inapplicable. *See* 8 CFR § 1240.8(d)(2007). Thus, if the government's evidence "indicates" that one of more of the grounds for mandatory denial of the application for relief are applicable, the burden of proof shifts to the individual seeking said form of relief to show–by a preponderance of the evidence–that the mandatory denial is inapplicable. *Matter of S-K-*, 23 I & N Dec. 936, 939 (BIA 2006); *Matter of R-S-H,* 23 I & N Dec. 629, 640 (BIA 2003); *see also Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006).

### B. Eligibility for Waiver Pursuant to INA § 237(a)(1)(H)

As previously discussed, an individual may apply for a waiver of said ground of deportability if he or she (1) is not described in INA § 237(4)(D) as an individual who assisted or otherwise participated in Nazi-sponsored persecution; (2) is the spouse, parent, son, or daughter of a United States citizen or lawful permanent resident;[1] (3) was otherwise admissible to the united States at the time of entry in question, and (4) merits a favorable exercise of discretion. INA § 237(a)(1)(H).

#### 1. Assisted or Otherwise Participated in Nazi-Sponsored Persecution

An individual seeking a waiver under INA § 237(a)(H) must first establish that he or she did not assist or otherwise participate in Nazi-sponsored persecution.

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[1] It is undisputed that Vladislava Zanjanckauskas, the Respondent's wife, and Diane Lavoie, the Respondent's daughter, are both United States citizens.

Mere membership in an organization (even one which engages in persecution) is insufficient to establish that an individual has assisted or otherwise participated in persecution. *Matter of Rodriguez-Majano,* 19 I&N Dec. 811, 814-815 (BIA 1988)(discussing the terms "assistance or participation in the persecution of others" in the context of an individual seeking to apply for asylum). Instead, the Court must engage in a particularized evaluation in order to determine whether the behavior of the individual in question was culpable to such a degree that he or she could be fairly deemed to have assisted or otherwise participated in persecution. *Fedorenko v. US,* 449 CIS 490, 512 (1981); *cf. Matter of A-H-,* 23 I & N Dec. 774, 775 (AG 2005)(look to the totality of relevant conduct in determining whether the persecutor bar to eligibility for asylum is applicable). Some degree of individual culpability should be required. *See generally Miranda Alvarado v. Gonzalez,* 449 F.3d 915, 918 (9th Cir. 2006). Consequently, factors such as the length of time during which the individual was involved in the acts, the types of threats used to compel assistance, and the efforts undertaken to escape are all relevant to the determination of whether an individual assisted or otherwise participated in Nazi-sponsored persecution. *Fedorenko,* 449 US at 512.

*Fedorenko* thus provided a "continuum of conduct" against which an individual's actions must be evaluated. *Casteneda-Castillo v. Gonzales,* 464 F.3d 112, 134 ($1^{st}$ Cir. 2006), *rehearing en banc granted, opinion vacated by* 438 F.3d 17 ($1^{st}$ Cir. 2007).

### 2. Otherwise Admissible to the United States at Time of Entry

An individual seeking a waiver under INA § 237(a)(1)(H) must also establish that he or she is otherwise admissible to the United States at the time of his or her entry, *except* for those grounds of inadmissibility that are the *direct result* of that fraud or misrepresentation (emphasis added).

The Immigration and Nationality Act ("INA") does not define the term "direct result." Thus, it is appropriate to apply the ordinary, common meaning of the phrase. *Smith v. US,* 508 US 223, 228 (1993); *US v. Londono-Quintero,* 289 F.3d 147, 153 (1st Cir. 2002). The term "direct" means "stemming immediately from a source," *Merriam-Webster's Collegiate Dictionary,* 328 (10th Ed. 1999), while the term "result" means an action that occurs "as a consequence, issue, or conclusion," *Id.* at 998. Therefore, a ground of inadmissibility is the "direct result" of the fraud or misrepresentation that the individual is seeking to waive only if it occurs as an immediate consequence of that fraud or misrepresentation. *See generally id.*

### 3. Merits Favorable Exercise of Discretion

Finally, an individual seeking a waiver under INA § 237(a)(1)(H) must establish that he or she merits a favorable exercise of discretion. INA § 240(c)(4)(A)(i)-(ii); *see also Matter of Tijam,* 20 I & N Dec. 408 (BIA 1998).

In determining whether an individual merits a favorable exercise of discretion, the Court must balance the individual's "undesirability as a lawful permanent resident" with the "social and humane considerations"present. *Matter of Tijam,* 20 I & N at 412. Thus, the Court may consider (1) the nature and underlying circumstances of the initial fraud or misrepresentation involved; (2) the nature, seriousness, and recency of any criminal record; (3) other evidence of bad character or undesirability as a lawful permanent resident; (4) family ties in the United States; (5) residence of long duration in the United States; (6) evidence of hardship to family or individual should removal occur; (7) stable employment history; (8) existence of property or business ties; (9) evidence of value and service to the country, and (10) other evidence of good character. *See id.* at 412-413.

## VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Bars to Eligibility: Assisted or Otherwise Participated in Nazi-Sponsored Persecution

#### 1. Burdens of Proof

#### A. Government's Initial Burden of Proof

The Court finds that the Government has met its burden of proof and persuasion, and has provided "some evidence" that the Respondent assisted or otherwise participated in Nazi-sponsored persecution. Accordingly, the burden of proof shifts to the Respondent to establish "by a preponderance of the evidence" that he did not in fact, assist or otherwise participate in Nazi-sponsored persecution. 8 CFR § 1240.d(8)(2007), *see also Matter of S-K-*, 23 I & N

Dec. 936, 939 (BIA 2006); *Matter of R-S-H*, 23 I & N Dec. 629, 640 (BIA 2003).

As a threshold matter, the District Court determined that the Respondent and other Trawniki men were deployed to Warsaw to help accomplish the April 17, 1943, liquidation of the Warsaw Jewish Ghetto. *United States v. Zajanckauskas*, 353 F. Supp. 2d 196, 203 (Mass. Dist. Ct. 2005), *aff'd* 441 F.3d 32 (1st Cir. 2006). *See also* Exhibit 1. For purposes of collateral estoppel, the District Court's findings of fact with respect to this issue have been incorporated by reference into this Court's decision. *See* Section II *infra*, *see also* Exhibit 16. Not only has the Government established that the Respondent was deployed to the Warsaw Ghetto to assist in its liquidation, but it has also established that he actively participated in the Ghetto's destruction. Through the testimony of Dr. Black, the Government has demonstrated that Trawniki men such as the Respondent participated in the destruction of the Warsaw Jewish Ghetto, and that their duties (among others) were to cordon off the Ghetto during the operation. *See* Exhibit 17 at 0554-0535, 0538, 0553-0554. The Government has also demonstrated that the Respondent's own particular sub-unit of Trawniki men were responsible for rape, murder, and other acts of barbarism. *See id.* at 0177-0183; 0542-0546.

The Government has also established (and the Respondent has admitted) that the Respondent was trained at Trawniki Camp as part of a special Non-Commissioned Officer course. See Exhibit 17 at 0013. Such training often comprised the rounding up and guarding of Jewish prisoners and preventing their escape. *See id.* at 0657, 0671, 0718, 0731, and 0749.

Men trained at Trawniki Camp, including the Respondent, were trained to assist in all aspects of Operation Reinhard, the Nazi plan to murder all Jews in Poland. *See* Exhibit 1; *see also* Exhibit 5 and Exhibit 10.

The Respondent argues that the Government has failed to meet its burden of proof because it has not established that he "personally ordered, incited, assisted, or otherwise participated in the persecution of individuals," or he is "individual[ly] accountab[le]" for acts of persecution. *Alvarado v Gonzales*, 449 F.3d 915, 926 n.8 (9th Cir. 2006) *qtg. Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir. 2004)(discussing possible elements in a determination of whether an individual actually assisted participated in persecution). The Respondent further posits that the Government's burden of proof in this manner can only be met by affirmative evidence that he was an armed guard either at Trawniki Camp or in Warsaw. However, the Respondent's argument fails, as he confuses a determination of whether an individual *actually* assisted or participated in Nazi-sponsored persecution with the determination of whether the Government met its initial *burden of proof* and put forth "some evidence" that the Respondent assisted or participated in said persecution. *See generally Id.* To shift the burden of proof to the Respondent, the Government must merely adduce "some evidence" that he has assisted in or participated in Nazi-sponsored persecution; there is no threshold requirement mandating that the evidence establish the precise extent of the Respondent's involvement in said persecutory acts or whether he was held individually accountable for those acts. See 8 CFR § 1240 8(d)(2007).[2]

The District Court's findings, read in conjunction with the evidence put forth by the Government, is sufficient to meet their burden of providing "some evidence" that the Respondent. Based on the foregoing, the Court therefore finds that the burden of proof and persuasion now shifts to the Respondent to show, by a preponderance of the evidence, that he did not, in fact, assist or otherwise participate in Nazi-sponsored persecution.

### B. Respondent's Burden of Proof

During the course of the instant removal proceedings, the Respondent has steadfastly denied that he was deployed to Warsaw. As discussed previously, the issue of whether the Respondent had been present in Warsaw was litigated before the District Court in *United State v. Zajanckauska*, 353 F. Supp. 2d 196 (Mass. Dist. Ct. 2005). Thus, as discussed in Section II and extensively in Exhibit 16, the Respondent is estopped in these proceedings from denying or otherwise re-litigating the issue of his presence in Warsaw.

Apart from this denial, however, the Respondent has not testified credibly with respect to his activities at the Trawniki Camp or his deployment to Warsaw.

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[2] Indeed, the term "some evidence" would be rendered virtually meaningless if the Government's burden of proof could only be met by establishing that the Respondent committed specific acts (i.e., that he was an armed guard at either Trawniki Camp or in Warsaw).

Nor has the Respondent provided any additional evidence to rebut the Government's documentary evidence and the District Court's finding in *United States v. Zajanckauskas*, 353 F. Supp. 2d 196 (Mass. Dist. Ct. 2005). The Court therefore finds that the Respondent has failed to meet his burden of proof and establish, by a preponderance of the evidence, that he did not assist or otherwise participate in Nazi-sponsored persecution. *See* INA § 240(c)(4)(C)(an individual's incredible testimony, standing alone, is insufficient to meet his or her burden of proof); *see also Matter of S-K-*, 23 I & N Dec. 936, 939 (BIA 2006); *Matter of R-S-H*, 23 I & N Dec. 629, 640 (BIA 2003).

In sum, the Government has provided sufficient evidence to "indicate" that the Respondent had assisted or otherwise participated in Nazi-sponsored persecution. The burden of proof and production accordingly shifted to the Respondent to establish, by a preponderance of the evidence, that he did not assist in or otherwise participate in Nazi-sponsored persecution. *See Matter of S-K-*, 23 I & N Dec. 936, 939 (BIA 2006); *Matter of R-S-H,* 23 I & N Dec. 629, 640 (BIA 2003). Given that the Respondent has neither testified nor offered any documentation to rebut the Government's evidence, the Court finds that the Respondent has not met his burden of proof.

### 2. Legal Standard for Assisting or Otherwise Participating in Nazi-Sponsored Persecution

As discussed in the foregoing section on the allocation of burdens of proof, the Respondent has failed to establish that the bar to relief under INA § 237(a)(1)(H) for those who have assisted or participated in Nazi-sponsored persecution is otherwise inapplicable. Based upon both the Government's evidence and the Respondent's failure to meet his burden of proof, the Court is therefore compelled to conclude that he did, in fact, assist and participate in Nazi-sponsored persecution.

Evidence of an individual's specific acts of brutality are unnecessary in the determination of whether he or she has assisted or otherwise participated in Nazi-sponsored persecution. *Szehinskyj v. Attorney General,* 432 F.3d 253, 254 (3d Cir. 2005); *Dailide v. Attorney General,* 387 F.3d 1335, 1342 (11th Cir. 2004); *Hammer v. INS,* 195 F.3d 836, 843 (6th Cir. 1999); *cf. Petkiewytsch v. INS,* 945 F.2d 871, 880 (6th Cir. 1991)(Sixth Circuit Court of Appeals disregarded the plain language of the Holtzman Amendment in its determination that those who did not take an "active role" in persecution did not assist or otherwise participate in Nazi-sponsored persecution); *Laipenieks v. INS,* 750 F.2d 1427, 1432 (9th Cir. 1985)(same). It is unnecessary for the Government to "present evidence of personal involvement in specific atrocities," such that the bar applies. *Hammer,* 195 F.3d at 842. Instead, the terms "assist"and "participate" are given a broad view to include *any* person who *assisted* the Third Reich, *Szehinskyj,* 432 F.3d at 256-261 (emphasis added). As the Seventh Circuit aptly commented:

> Assigning personal responsibility in a military regime is complex, particularly with regard to Holocaust era crimes because the Nazis' murderous proficiency insured there would be few witnesses. In only a handful of these cases are there people who can place the accused at

> the scene of a specific crime with the gun in his hand. The same is true here ... Assistance [in persecution] may be inferred from the general nature of the person's role in the war; therefore, the atrocities committed by a unit may be attributed to the individual based on his membership and seeming participation. *Kalejs v. INS,* 10 F.3d 441, 444 (7th Cir 1993).

This Court must determine whether the Respondent *assisted or otherwise participated* in Nazis-sponsored persecution, not whether he engaged in direct persecution or whether he personally shot or otherwise harmed individuals in either Trawniki or in Warsaw. INA § 237(a)(1)(H). Both the facts adduced in the related denaturalization proceedings and in the instant removal proceedings as well as the relevant case law establishes that the Respondent did, indeed. The Respondent began the war as a draftee into the Lithuanian (and eventually Russian) armies and was subsequently captured by the Germans as a prisoner of war. The Germans sent the Respondent to Trawniki Camp, whereupon he was given guard training, given a uniform, was paid, was allowed into an open munitions room, and was given leave. *See* Exhibit 10. During the course of the Respondent's stay at Trawniki, he participated in the Non-Commissioned Officers ("NCO") training course, received several promotions in rapid succession (eventually becoming one of the top-ranked individuals within his sub-unit), provisioned the camp's canteen by trading Schnapps for eggs in the nearby village of Trawniki, and served on occasion as a courier. *See id.* At some point during this period, the Respondent obtained a weapon from the munitions room, a room he describes as always open. *See id.*

The Respondent and his sub-unit were then attached to the Streibel Battalion, and were sent to Warsaw on or about April 17, 1943, to carry out Operation Reinhard, the liquidation of the Jewish Ghetto. *See generally* Exhibit 17. The Respondent has admitted that Trawniki men sent to Warsaw stood in the cordon to prevent Jews from escaping, guarded the transit square where captured Jews awaited transportation to labor and concentration camps, conducted house-to-house searches for hidden Jews, skirmished with resistance fighters, and took part in the shooting of some captured Jews. *See* Exhibit 1; *see also* Exhibit 5. Indeed, the Respondent's particular battalion was deployed to the Assembly Point, where atrocities such as rape and murder occurred with horrifying regularity. *See* Exhibit 17 at 0947-0949, 0177-0183. Given that the men involved in the Trawniki NCO Training Course and members of his particular sub-unit committed such terrible crimes, the Respondent was particularly likely to have been involved in what has been characterized as "some of the most heinous atrocities of the operation." *See* Exhibit 17 at 0137-0140.

The activities comprising training at Trawniki Camp have been repeatedly deemed to involve assistance or participation in Nazi-sponsored persecution, as the training regimen often included practical experience rounding up or guarding Jewish civilians and preventing them from escaping the camp's confines. *See United States v. Mandycz,* 359 F.Supp. 601, 604 (D.Mich. 2005); *United States v. Hadja,* 963 F. Supp. 1452, 1453 (D. Ill. 1997); *United States v. Demjanjuk,* 2002 WL 544622 at 13 (N.D. Ohio 2002), *aff'd* 367 F.3d 623, 632 (6th Cir. 2004). More importantly, however, participation in the destruction of the Warsaw Jewish Ghetto has been repeatedly determined to constitute assistance or participation in Nazi-sponsored persecution. *See United States v. Reimer,* 356 F.3d 456 (2d Cir. 2004)(Trawniki man who served as paymaster during the clearance of the Warsaw Jewish Ghetto assisted in Nazi-sponsored persecution); *Naujalis v. INS,* 240 F.3d 642, 646 (7th Cir. 2001), *citing United States v. Ciurinskas,* 148 F.3d 728, 734 (7th Cir. 1998); *United States v. Kwoczak,* 212 F. Supp. 2d 638 (E.D. Pa 2002)(individual who served during his unit's participation of the destruction of the Warsaw Ghetto constituted assistance in persecution).

When analyzed in light of the "continuum of conduct"suggested by *Fedorenko* and *Casteneda-Castillo,* the Respondent's actions were comprised of much more than merely serving as Trawniki Camp's barber or in some other innocuous role within the Trawniki Camp. *See Fedorenko,* 449 US at 512 n. 34; 464 F.3d at 132. The Respondent's actions were also inconsistent with those of an individual who only acquiesced to the actions of the Nazi Party *Matter of Rodriguez-Majano.* 19 I & N at 814-815. The Respondent's testimony and the facts brought forth during the course of the removal proceedings belie his contention that he was an unknowing, passive observer who merely exchanged Schnapps for eggs, provisioned the canteen, and occasionally served as a courier. Instead, the Respondent played a somewhat active role in the persecution, as he participated in extensive training at Trawniki Camp and was eventually detailed to Warsaw to participate in Operation Reinhard, the Nazi's plan to exterminate all Jews in Warsaw. Given these circumstances, the Respondent did not explain how his presence at what has been described as a "liquidation"conforms with descriptions that he was associated with the Nazi persecution in an attenuated, tangential manner. The Respondent similarly did not explain how he was unaware of the activities occurring both in the Trawniki Camp and in Warsaw during this period, especially since he was frequently given leave to go to Trawniki village or even to Warsaw. Based on the foregoing, the Court finds that the Respondent did, in fact, assist or otherwise participate in Nazi-sponsored persecution.

### B. Otherwise Admissible to the United States at Time of Entry

Additionally, the Court finds that the Respondent was not otherwise admissible to the United States at the time of his entry in 1950.

A waiver pursuant to INA § 237(a)(l)(H) waives both the ground of inadmissibility and the underlying fraud or misrepresentation. *Reid v. INS,* 420 US 619, 630 (1975); *see also Matter of Sosa-Hernandez,* 20 I & N Dec. 758, 760-671 (BIA 1993). However, an individual who applies for a waiver pursuant to INA § 237(a)(1)(H) must establish that "he or she would have been admitted even if he or she had not lied." *INS v. Errico,* 385 US 214, 217 (1966). Even if the Respondent had not lied, his assistance in Nazi persecution and his membership in a movement deemed hostile to the United States rendered him *separately* inadmissible under § 2(b) of the Displaced Persons Act ("DPA"), 62 Stat. 1009 (1949), and under former 22 CFR § 53.33(j)(1949).

The Respondent argues that a waiver pursuant to INA § 237(a)(1)(H) prevents the Government from using the Respondent's wartime whereabouts and activities to establish that he was not "otherwise admissible" at the time of his entry because these activities were the nature of his underlying misrepresentations. The Respondent further argues that a waiver pursuant to INA § 237(a)(1)(H) "cleared ...the illegality which attached to the visa and to the entry." *Matter of Sosa-Hernandez,* 20 I & N Dec. at 761; *Matter of Manchisi,* 12 I & N Dec. 132 (BIA 1967). These arguments, however, confuse those grounds of inadmissibility that are the subject matter of the Respondent's fraud (i.e., his assistance in Nazi sponsored persecution) with those grounds of inadmissibility that are the "direct result" of his fraud (i.e., that he lacked a valid visa because he lied and submitted fraudulent documentation in support of that visa). *See generally Langhammer v. Hamilton,* 295 F. 2d 642 (1st Cir. 1961)(individual who fraudulently concealed his membership in the Communist Party was not otherwise admissible because of that Communist Party membership). In establishing a waiver under INA § 237(a)(1)(H) (former INA § 241 (a)(1)(H)), Congress did not intend to "arm the dishonest alien seeking admission to our country with a sword by which he could avoid the numerous substantive grounds for exclusion [that are] unrelated to [the] fraud." *Reid,* 420 US at 632. Not only did the Respondent lie and submit fraudulent documents in connection with his 1950 visa application, but he also actively assisted or otherwise participated in Nazi sponsored persecution. The Respondent cannot now attempt to "bootstrap" his admissibility to the United States by stating that his fraudulent submissions in connection with his visa application and his persecutory activities are directly related, as he would not have otherwise been admissible to the United States if he had not lied.

### 1. Respondent's Inadmissibility Under the Displaced Persons Act § 2(b)

DPA § 2(b) barred any individual who had "assisted the enemy in persecution of civil populations" from being admitted to the United States. 62 Stat. 1009, 1013 (1948). Similar to the standard for determining whether an individual had "assisted or otherwise participated in Nazi-sponsored persecution," an individual need not have committed a particular atrocity or specific persecutory act to be inadmissible under DPA § 2(b). *Fedorenko,* 449 US at 510 n. 32; *Szehinskyj,* 227 F.3d at 339; *United States v. Ciruinskas,* 148 F.3d 729, 734 (7th Cir. 1998).

As discussed extensively in Section VII(A), *infra,* the Court has determined that the Respondent assisted in Nazi-sponsored persecution. The Respondent therefore was prohibited from receiving DPA visa. The Respondent remained inadmissible to the United States at the time of his 1950 application.

### 2. Respondent's Inadmissibility Under Former 22 CFR §§ 53.32(a) and 53.33(j)(1949)

Former 22 C.F.R. § 53.32(a)(1949) barred any individual from admission if there was a "reason to believe that the entry of the alien would be prejudicial to the interests of the United States." Former 22 CFR § 53.33(j)(1949) similarly barred any individual from admission to the United States who "advocated or acquiesced in activities or conduct contrary to civilization and human decency on behalf of the Axis countries" during World War II.

Again, as discussed extensively in Section VII(A), infra, the Court has determined that the Respondent assisted or otherwise participated in Nazi-sponsored persecution. Given the foregoing findings of fact and conclusions of law, there is no question that the Respondent's admission would have been prejudicial to the interests of the United States. *See generally United States v. Ciurinskas,* 976 F. Supp. 1167, 1187-1188(N.D. Ill. 1997), *aff'd* 148 F.3d 729 (7th Cir. 1998)(admission of Lithuanian member of Nazi guard force prejudicial to interests of the United States). There is also no question that the Respondent acquiesced in activities and conduct contrary to civilization and human decency on behalf of Axis countries. *See id.* (individual who was "aware of" activities against Jews and whose participation in such conduct–"whether active or passive"–constituted acquiescence in activities and conduct contrary to civilization and human decency.") The Respondent was therefore inadmissible to the United States under both former 22 CFR § 53.32(a)(1949) and 22 CFR § 53.33(j)(1949) at the time of his 1950 application.

### C. Discretion

After a careful consideration of the Record of Proceedings, the Court also finds that the Respondent does not merit relief in the exercise of discretion.

The Court acknowledges that the Respondent presents several favorable considerations, as he is ninety-one years of age and has been present in the United States since February 1950, nearly sixty years.

The Court also acknowledges that the Respondent is the patriarch of an extensive family in the United States; his wife, daughter, three grandchildren, and four great-grandchildren, all of whom are United States citizens, reside in the Worcester, Massachusetts, area, and have what he has characterized as a "very close relationship."

Additionally, the Respondent has been a law-abiding individual, and has no criminal record in the United States. Prior to his retirement at age sixty-seven, the Respondent had been lawfully employed as an Assistant Superintendent at Dalpol Plastics in Worcester, Massachusetts, a position wherein he supervised over two hundred employees and was entrusted with extensive managerial responsibilities.

The Respondent and his wife, Vladislava Zanjanckauskas, are also in poor health and suffer from various medical conditions that, combined with their ages, would cause them hardship if they are forced to return to Lithuania. The Respondent suffers from hypertension, atrial fibrillation, varicose veins, osteoarthritis, and anxiety, and has had his spleen, gall bladder, and testicles removed. *See* Exhibit 5; *see also* Exhibit 11. Ms Zanjanckauskas is in similarly poor health, and suffers from high blood pressure, osteoarthritis, Post-Traumatic Stress Disorder, and the beginning stages of Alzheimer's Disease. *See generally*, Exhibit 23. Neither the Respondent nor Ms. Zanjanckauskas have family members or friends in Lithuania or Poland who can assist in their medical regimes or otherwise care for them should their conditions worsen upon return.

However, although the Respondent does present substantial positive equities in the United States, the nature and circumstances underlying his initial misrepresentations to various United States Government officials is of particular significance to this Court. Congress enacted former INA § 241(a)(1)(H) (now INA § 237(a)(1)(H) to protect refugees who, out of fear of forcible repatriation to their homelands, "misrepresented their place of birth when applying for a visa... and such misrepresentations did not have as its basis the desire to evade... an investigation in the place of their former residence." *INS v.* Errico, 385 US 214, 219 (1966), *citing* H.R. Rep. No. 2096, 82$^{nd}$ Cong., 2d Sess., p. 128 (1952). The Respondent did not misrepresent his place of birth or his activities at Trawniki out of a fear of forcible repatriation to Lithuania or Poland; rather, he did so out of a desire to avoid any investigation into his place of former residence and to further conceal his assistance in Nazi-assisted persecution. In the Court's estimation, the very nature and circumstances of the Respondent's misrepresentations are extremely serious factors in determining whether a favorable exercise of discretion is warranted.

The Respondent's near sixty-year history of misrepresenting the extent of his activities at Trawniki Camp and in Warsaw are also of particular significance to this court. On or about the time of his 1950 admission to the United States, the Respondent failed to disclose his Trawniki service and instead falsely indicated to the Displaced Persons Commission that he had been employed at a farm in Lithuania through 1944. *See* Exhibit 19. At that time, the Respondent also falsified his Application for an Immigration Visa by submitting both a fraudulent birth certificate and by claiming that he resided in Lithuania through 1944, *See id.* The Respondent continued this pattern of misrepresentation following his arrival in the United States, whereupon he concealed his Trawniki service by indicating that Ms. Zanjankauskas was born in Trakai, Poland, rather than Trawniki, Poland, on his Application for Certificate of Arrival, his Declaration of Intention, and his Statement of Facts for Preparation of Petition/Petition for Naturalization. *See Matter of Tijam*, 22 I & N Dec. 413-414 (making false statements under oath during the naturalization process is an "extremely serious" adverse factor in determining whether a favorable exercise of discretion is warranted).

Nearly sixty years later, the Respondent continues to conceal his Trawniki service and attempts to mislead the Government as to activities during World War II. During the course of his 2005 denaturalization proceedings, the Respondent stated that he "thinks" he would lie again to remain in the United States. *See* Exhibit 17 at 0070. Based, in part, on this admission, the Massachusetts District Court determined that the Respondent "went to great lengths to understate his training and service in his testimony," and that his testimony before that tribunal "defied reason and common sense," and was "largely irreconcilable with other evidence." *United States v. Zanjanckauskas*, 353 F Supp. 2d 196, 198 (D.Mass. 2005). Moreover, as discussed in the foregoing section on credibility and corroborating documentation, the Respondent testified incredibly, and exhibited similar evasiveness before this Court as he did before the Massachusetts District Court. *See* Section IV (B), *supra.* Most notably, the Respondent provided implausible, inconsistent, and "minimized" testimony with respect to his service with the German military, his treatment at Hammerstein Camp, his training and experiences at Trawniki Camp, and his eventual deployment to Warsaw. *See id.* That the Court determined the Respondent to be incredible during the course of the instant removal proceedings–proceedings in which he yet again seeks to obtain a benefit from the United States Government–is a severe adverse factor. *See Matter of Tijam*, 22 I & N Dec. at 413-414 (finding of false testimony during the course of a hearing in which a waiver pursuant to former INA § 241(a)(1)(H) or INA § 237(a)(1)(H) is an extremely serious adverse factor in determining whether a favorable exercise of discretion is warranted.)

The Court does not wish to diminish the impact to the Respondent and the hardship that his family will undoubtedly suffer upon his removal to Lithuania. Nor does it wish to diminish the Respondent's medical problems or the medical problems of Ms. Zanjankauskas. However, the Respondent's misrepresentations to United States Government officials span approximately sixty years; rather than coming forward and fully acknowledging his activities in connection with the Trawniki Camp and in Warsaw, the Respondent has instead repeatedly chosen to embark on a course of dishonesty that is noteworthy only for the scope and magnitude of the activities he attempts to conceal. When viewed in that light, the Respondent's pattern of misrepresentations has "determined the outcome of the case." *Matter of Garcia-Castillo*, 10 I & N Dec. 790, 792 (BIA 1964). Therefore, based on the foregoing, the Court in its discretion, denies the Respondent's Application for Waiver pursuant to INA § 237(a)(1)(H).

## VII. CONCLUSION AND ORDERS

In sum, the Court finds that the Government met its initial burden of proof and persuasion, and provided "some evidence" that a mandatory bar for a Waiver pursuant to INA § 237(a)(1)(H) existed; specifically, the Government provided "some evidence" that the Respondent assisted or otherwise participated in Nazi-sponsored persecution. The Respondent, however, failed to meet his burden of proof, and did not establish by a "preponderance of the evidence" that the mandatory bar for a Waiver pursuant to INA § 237(a)(1)(H) was inapplicable.

Based on the foregoing allocation of the burdens of proof, the Court also finds that the Respondent is ineligible for a Waiver pursuant to INA § 237(a)(1)(H), as he (1) assisted or otherwise participated in Nazi-sponsored persecution; (2) was not otherwise admissible to the United States at the time of his entry in 1950, and (3) does not merit a favorable exercise of discretion.

The following **ORDERS** shall be entered:

**Count 1:** Withdrawn by the Government

**Count 2:** The Government has established by **CLEAR AND CONVINCING** evidence that the Respondent violated **INA § 237(a)(1)(A):** Alien Who at the Time of Entry or Adjustment of Status Was Within One or More of the Classes of Aliens Inadmissible by Law, to wit: Alien who, Under Section 10 of the Displaced Persons Act of 1948, 62 Stat. 1009 (1948) ("DPA"), Willfully Made Misrepresentations of

Material Fact for the Purpose of Gaining Admission to the United States as a Displaced Person.

**Count 3:** The Government has also established by **CLEAR AND CONVINCING** evidence that the Respondent violated **INA § 237(a)(1)(A):** Alien Who, At the Time of Entry or Adjustment of Status, Was Within One or More of the Classes of Aliens Inadmissible by Law, to wit: As a Direct Result of Willful, Material Misrepresentations of Material Fact, an Alien Not In Possession of a Valid, Unexpired Visa under the Immigration Act of 1924, 43 Stat. 153 (1924) ("1924 Act").

**IT IS ORDERED** that the Respondent's application for a waiver pursuant to Section 237(a)(1)(H) of the Act be, and the same is hereby, **DENIED;**

**IT IS FURTHER ORDERED** that the Respondent's application for adjustment of status be, and the same is hereby, **DENIED;**

**IT IS FURTHER ORDERED** that the Respondent be **REMOVED** from the United States to **LITHUANIA,**

8/2/07 /s/WAYNE R. ISKRA
Date WAYNE R. ISKRA
United States Immigration Judge

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## APPENDIX D

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**United States District Court**
**District of Massachusetts**

**Civil Action No. 02-40107-NMG**

**[Filed January 26, 2005]**

UNITED STATES OF AMERICA, )
)
Plaintiff, )
)
v. )
)
VLADAS ZAJANCKAUSKAS, a/k/a )
Vladas Zajančkauskas, a/k/a )
Vladislovas Zajančkauskas, a/k/a )
Vladas Zak, )
)
Defendant. )
)

## MEMORANDUM OF DECISION

**GORTON, J.**

On June 5, 2002, the United States ("the government") commenced this civil action against Vladas Zajanckauskas ("Zajanckauskas") alleging that he made materially false statements on his visa application in connection with his immigration into the United States. Pursuant to 8 U.S.C. § 1451, the government now seeks a judgment declaring revocation of his citizenship and cancellation of his Certificate of Naturalization. The parties appeared for trial before this Court, sitting without a jury, on January 10, 2005, and two subsequent trial days. The Court now announces its findings of fact and conclusions of law.

## I. Findings of Fact

The parties stipulated to a number of facts and legal conclusions which narrowed the issues at trial and facilitated a focused presentation of the evidence. Keeping with that approach, the Court briefly summarizes the stipulations and then proceeds to consider the essence of the dispute.

Zajanckauskas was born on December 27, 1915 in Lithuania. On May 1, 1939, he was inducted into the Lithuanian Army and soon thereafter Lithuania was invaded by and subjugated to the Soviet Union and his unit became part of the Soviet Army. Within another year, Nazi Germany invaded Soviet Lithuania and Zajanckauskas was captured by the Germans on July 10, 1941. After spending some time in a German prisoner of war camp, Zajanckauskas was recruited to serve in the German Army and was sent to the Trawniki Training Camp ("Trawniki"). He arrived there on July 23, 1942, and received Trawniki Identification Number 2122.

In April, 1943, the Germans began the final liquidation of the Jewish Ghetto population in Warsaw, Poland using a combination of German armed forces, police and Trawniki guards. Zajanckauskas was stationed at Trawniki when troops were deployed from that camp to Warsaw and the sole disputed issue in this case is whether Zajanckauskas actually went to Warsaw as part of that deployment.

The parties have agreed that if Zajanckauskas went to Warsaw, his United States citizenship was illegally procured. If he did not go to Warsaw, his citizenship is valid. The Court accepts the parties' stipulations and resolves the disputed issue of fact in the following numbered paragraphs.

### A. Testimonial Evidence

1. The government offered the expert testimony of Dr. Peter R. Black, the Director of the Office of the Senior Historian at the Center for Advanced Holocaust Studies of the United States Holocaust Memorial Museum ("Dr. Black"). Although the Court does not accept Dr. Black's contention of complete impartiality, it finds that his testimony was generally informative and reliable and, to a large extent, his conclusions were firmly supported by documentary evidence, leaving no appearance of undue bias. Where the Court disagrees with Dr. Black's specific conclusions, it is noted below. On balance, his testimony was credible and his conclusions weigh in the Court's judgment of the facts.

2. The government also offered the testimony of Samuel Hilton ("Hilton"), a survivor of the liquidation of the Warsaw Ghetto. Mr. Hilton confirmed the validity of many of the parties' stipulations concerning conditions in Warsaw but his testimony was not probative of whether Zajanckauskas was deployed to Warsaw.

3. The government called Zajanckauskas to testify. He described his experiences at Trawniki and denied that he went to Warsaw in April, 1943. His testimony was not credible because it was largely irreconcilable with other evidence, including the testimony of Dr. Black concerning the treatment of Trawniki recruits ("Trawniki men"), descriptions of training at Trawniki contained in transcripts of Russian interrogations of captured Trawniki men ("interrogation protocols"), the defendant's own prior testimony and because his testimony defied reason and common sense.

4. Moreover, Zajanckauskas was not credible when he claimed that he was not paid for his service in the German Army, that he only handled a rifle (unloaded) for several days in order to perform marching drills and that he received no training in Nazi ideology. The evidence shows that, to the contrary, Trawniki men were paid, trained with (and used) rifles and received ideological training. In general, the German Army treated Trawniki men like German soldiers and Zajanckauskas went to great lengths to understate his training and service in his testimony.

5. The Court disbelieves Zajanckauskas's testimony that, on the days when thousands of Jews were being murdered at Trawniki, he was unaware of what was happening. That testimony is implausible because the executions took place within one hundred yards of the canteen where he claims he worked and the bodies of the dead were burned afterward at the camp for several days, creating what must have been horrific activity and odor. Indeed, the evidence showed that even townspeople, several miles away, became well aware of the carnage.

6. Zajanckauskas admitted that he had lied on his visa application insofar as he did not disclose his service at Trawniki and, although the parties have stipulated that his failure to disclose that service is not grounds for denaturalization, when Zajanckauskas was asked whether he would lie again to stay in the United States, he replied "I think so". On the basis of the entirety of Zajanckauskas's testimony, the Court accords it no credence.

7. Zajanckauskas offered the deposition testimony of his wife, Vladislava Zajanckauskas ("Vladislava"), and of his brother-in-law, Jozef Peter Kowalcyk ("Kowalcyk")(collectively "the supporting depositions"). The Court finds the supporting depositions largely incredible. Vladislava has a history of lying on her husband's behalf: she falsified her place of birth (the Village of Trawniki) on her application for a United States visa in an effort to hide her husband's German military service. Kowalcyk, likewise, has offered several different stories concerning Zajanckauskas's whereabouts at various times, suggesting that he is either lying or that his memory is seriously flawed. His deposition affords evidence of the latter.

8. To the extent that the supporting depositions are credible, they are unhelpful insofar as neither witness has sufficient personal knowledge to say what Zajanckauskas did during the war or where he went while stationed at Trawniki. They offer only approximate times of when Zajanckauskas was visiting them (and thus not in Warsaw) which do not resolve the issue of the defendant's deployment to that city. The depositions are, therefore, accorded little weight.

## B. Zajanckauskas's Training at Trawniki

9. Trawniki was designed to house and train recruits as guards for use by the Nazi German Armed Forces. Trawniki men were recruited from various countries in Eastern Europe and many recruits began as German prisoners of war. Recruits received training in military drill and rifle use, guarding of prisoners and Nazi ideology. The recruits were also often sent to a school for non-commissioned officers ("NCO school") where they received additional training and promotions upon graduation. The recruits were paid, were permitted to go on leave and, if they were killed, their families received a benefit.

10. Zajanckauskas became a "Trawniki man" in July, 1942 and was accorded the rank of Wachmann (guard private). He attended NCO school and his Trawniki Personnel File indicates that he was promoted to Oberwachmann (guard private first class), then to Gruppenwachmann (guard sergeant) and finally to Zugwachmann (guard staff sergeant) within approximately 18 months. Although promotions were generally awarded on the basis of merit, it remains unclear why Zajanckauskas was promoted and the Court draws no conclusions about his service based upon his promotions.

11. Just as with other Trawniki men, the Court finds that Zajanckauskas was paid and was granted leave. He took a short leave during February, 1943, to return to Lithuania. As a result of his attendance at NCO school, he received training in the use of firearms and Nazi ideology.

12. Based upon information contained in interrogation protocols, Zajanckauskas spent time working for the Trawniki Camp canteen as a purchaser of food and beverages. There is no credible evidence, however, from which to determine exactly when Zajanckauskas began working in that role or whether it was his exclusive role at Trawniki.

13. Defendant's contention, through counsel, that his linguistic skills (i.e. fluency in the local language) made him valuable to the Germans as a purchaser of goods such that he would not have been relieved from those duties for a deployment remains suspect, however, because there is no evidence that defendant's linguistic skills were, in fact, unique or valuable among the Baltic recruits at Trawniki. There is also no evidencethat it was German military practice to take into account such skills when deploying troops.

### C. Zajanckauskas's Deployment to Warsaw

14. On April 17, 1943, German command at Trawniki created a document entitled (in translation) "Roster of guards detailed to the Warsaw Detachment" ("the Roster"). It is stipulated to be authentic. The Roster contains a list of 351 "Trawniki men" who were to be deployed to Warsaw to participate in the liquidation of the Warsaw Ghetto. Zajanckauskas's name and identification number appear on it at #6. His listing as a "guard sergeant" (in translation) made him one of the 16 most highly ranked "Trawniki men" on the Roster.

15. Defendant's name was not erroneously included on the Roster. The fact that the Roster correctly identifies his rank and identification number excludes

any reasonable possibility that he was included by error. Moreover, in two places on the Roster, where other names had been erroneously included, the transcriber made corrections on the document. No such correction was made with respect to Zajanckauskas.

16. The Roster was not a "draft" to be superceded by a later document. The Court accepts Dr. Black's explanation that the German military did not create draft documents because typewriters rendered document production time consuming and tedious. Furthermore, given that a little more than one day elapsed between the time the Roster was prepared (April 17, 1943) and the time the Trawniki men were deployed (April 18, 1943), even if drafts were sometimes used, it is unlikely that one would have been created in this case. Finally, the Roster was signed by a German officer on a line preceded by the words (in translation) "turned over". It is implausible that an officer would have signed a draft document.

17. The interrogation protocol of Mikhail Laptev discloses that the Trawniki men arrived at Warsaw on the evening of April 18, 1943. The Court accepts Dr. Black's testimony that it took two or three hours to travel from Trawniki to Warsaw, meaning that the troops most likely did not depart Trawniki until the afternoon of April 18, 1943, probably less than one full day after the creation of the Roster.

18. Several German troop transfer orders offered by the government demonstrate that if a document stated that a soldier was to be deployed somewhere and that order was subsequently changed, the German practice was to make a correction to the document. The lack of

such a correction with respect to Zajanckauskas's name on the Roster clearly and unequivocally excludes the possibility that his deployment order was changed after the creation of the Roster.

19. The government offered convincing evidence that the Trawniki men listed on the Roster actually arrived in Warsaw. Several Trawniki men who were listed on the Roster (Aleksander Kuris, Mikhail Laptev and Roman Pitrow) admitted, via interrogation protocols, that they had been present in Warsaw and the government offered a telegram sent from German command at Warsaw disclosing the death of Borys Odartschenko, a Trawniki man listed on the Roster. Moreover, there is no documentary evidence to suggest that any man listed on the Roster was anywhere other than in Warsaw during the relevant time period, e.g. there are no reports of injuries or activities involving any of those men occurring elsewhere.

20. The comprehensive German report (with daily addenda) entitled "There is No Jewish Residential Quarter in Warsaw Any More!" ("the Stroop Report") references the deaths or injuries of 13 Trawniki men, all of whom are listed on the Roster.

21. The Stroop Report states (in translation) that there was an "average daily deployment" of 335 Trawniki men in Warsaw during the Ghetto liquidation. To the extent that there is a relationship between the number of Trawniki men listed on the Roster and the "average daily deployment" of Trawniki men in the Stroop Report, the Court discredits the explanation offered by both parties for the following reasons:

a) defendant's reliance on the discrepancy of 16 men as sufficient to forestall the government's proof that Zajanckauskas went to Warsaw is ill-conceived because an "average daily deployment" plainly cannot represent the number of men present on the first day, or any other single day for that matter; and

b) on the other hand, the government's theory, that the 335 figure represents the men on duty on any given day, i.e. some subset of the 351 Trawniki men present at Warsaw, is also demonstrably incorrect because the Stroop Report includes day-by-day reports of the actual number of Trawniki men "available for use" and the number reported is always well below 335. If 335 was an average number of the troops available each day, the daily reports would have to include numbers greater than 335.

22. The most plausible meaning of the "average daily deployment" number is that it indicates just what it says: the average number of Trawniki men present in Warsaw on that day, excluding those who were injured or killed while including those available but not on duty. Under that interpretation, assuming that 351 Trawniki men arrived in Warsaw on April 18, 1943, the "average daily deployment" would necessarily be less than 351 because Trawniki men were killed or injured on many of the days of the operation.

23. There is no way to replicate Stroop's calculations because several factors are unknown (e.g. the number of days in the average, the exact criteria for declaring a man "available", whether kitchen staff

were counted as being available, etc). Thus, the Court does not adopt either theory offered by the parties with respect to the meaning of the numbers in the Stroop Report.

24. Nonetheless, the Stroop Report does not suggest that fewer than 351 Trawniki men went to Warsaw, nor does it detract from the reliability of the Roster as evidence that the Defendant was deployed to Warsaw. To the contrary, the correlation between the injuries discussed in the Stroop Report and the names on the Roster demonstrates that the Roster accurately recorded the names of those men who were deployed to Warsaw.

25. The defendant's reliance on the fact that approximately 45 Trawniki men listed on the Roster have been interrogated (or have offered testimony) but that not one has placed Zajanckauskas at Warsaw at the crucial time is not probative of whether Zajanckauskas was deployed to Warsaw for the following reasons:

a) of the Trawniki men questioned (eight of whom were in Zajanckauskas's company), only 21 acknowledged their own presence in Warsaw, (two of whom, from what the evidence shows, were in that company),

b) although several men have identified Zajanckauskas as a fellow Trawniki man, none was asked whether Zajanckauskas went to Warsaw,

c) at no time has a Trawniki man in Zajanckauskas's company been asked, or volunteered, to identify any Trawniki men who were deployed to Warsaw, and

d) among Trawniki men in other companies, only one (Mikhail Laptev) identified fellow guards whom he recalled being in Warsaw but he listed only nine such men and there is no evidence that he knew Zajanckauskas.

The lack of such evidence may result from the fact that the focus of the Russian interrogators was, apparently, on who served at Trawniki rather than on those who were deployed elsewhere and it is, therefore, unremarkable that, of the few men who probably knew Zajanckauskas, no one volunteered his presence in Warsaw without being asked.

26. Accordingly, the government has presented clear, unequivocal and convincing evidence that Zajanckauskas was deployed to Warsaw with a detachment of Trawniki men, as demonstrated by the Roster, supported by other contemporaneous documentary evidence and the explanatory, expert testimony of Dr. Black.

27. In July, 1944, just before the German retreat from the Russian Attack, the Streibel Battalion was formed at Trawniki and Zajanckauskas served in it from its inception. From August, 1944 until January, 1945, the Battalion retreated through Poland and what is now the Czech Republic fleeing the advancing Soviet Army. In March, 1945, Zajanckauskas was discharged from German military service.

### D. Zajanckauskas's Immigration into the United States[1]

28. On January 24, 1950, Zajanckauskas filed Application for Immigration Visa and Alien Registration No. I-511015 with the United States Consulate in Salzburg, Austria.

29. On that application, Zajanckauskas stated that he was in Lithuania from 1929 to 1944. He did not mention his service at Trawniki or his deployment to Warsaw. He was issued Visa No. 382/2035 under the Displaced Persons Act and he entered the United States on February 19, 1950.

30. On April 28, 1956, Zajanckauskas signed and filed a Petition for Naturalization with the United States Immigration and Naturalization Service. On June 15, 1956, the Massachusetts Superior Court, sitting in Worcester, Massachusetts, granted the petition and issued to him Certificate of Naturalization No. 7445933.[2]

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[1] The following facts are undisputed.

[2] There is a discrepancy in the parties' various statements with respect to Zajanckauskas's Certificate of Naturalization number. The complaint lists the number as being "7445933" but the Joint Statement of Undisputed Facts (paragraph 49) lists it as "744933". The Court adopts the number set forth in the complaint but, obviously, intends to refer to the correct Certificate of Naturalization, whatever it may be.

## II. Conclusions of Law

A. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1345 and by 8 U.S.C. § 1451(a). Venue is proper under 8 U.S.C. § 1451(a).

B. Pursuant to 8 U.S.C. § 1451(a), if the citizenship of a citizen is proven to have been illegally procured, that person's citizenship must be revoked and his Certificate of Naturalization cancelled.

C. Pursuant to 8 U.S.C. § 1427, naturalized citizenship may be legally procured only by those who have been "lawfully admitted to the United States for permanent residence." To meet that standard, an individual must be in possession of a valid visa and be legally eligible for that visa. Fedorenko v. United States, 449 U.S. 490, 507 (1981).

D. To establish visa eligibility under the Displaced Persons Act, 62 Stat. 1009 ("the DPA"), the naturalized citizen has the burden of proving that he was "of concern to the International Refugee Organization" ("the IRO").

E. Annex I, Part II, of the Constitution of the IRO identifies certain individuals who are not of concern to the IRO, including "any . . . person who can be shown . . . to have assisted the enemy in persecuting civilian populations".

F. Section 10 of the DPA renders ineligible for a visa anyone "who shall willfully make a material misrepresentation for the purpose of gaining admission to the United States as an eligible displaced person". 62 Stat. 1013.

G. In accordance with governing law and, in particular, with Fedorenko v. United States, 449 U.S. 490 (1981) concerning the definition of "material misrepresentation", the parties have stipulated that:

> Zajanckauskas's wartime location and activities were material facts capable of affecting the decision of the vice consul who reviewed Zajanckauskas' Application for Immigration Visa in order to determine whether he was eligible under the DPA for an immigrant visa.

The parties have further stipulated that:

> If Zajanckauskas went to Warsaw in April and/or May 1943 with a Trawniki-based unit, he made a willful and material misrepresentation of his wartime location and activities to the DPC and on his visa application, and was therefore ineligible under Section 10 of the DPA to receive a visa.

Thus, the parties have agreed that Zajanckauskas's presence in Warsaw in April and/or May 1943 is dispositive.

H. In order to divest a naturalized citizen of his citizenship, the government must satisfy a "heavy burden of proof". Fedorenko, 449 U.S. at 505; United States v. Reimer, 2002 WL 32101927 (S.D.N.Y. Sept. 3, 2002). "The evidence justifying revocation of citizenship must be clear, unequivocal, and convincing and not leave the issue in doubt." Id.

I. The Roster, supporting contemporaneous documents and the testimony of Dr. Black prove, to the satisfaction of the above standard, that Zajanckauskas was present in Warsaw in April and/or May of 1943.

J. Therefore, Zajanckauskas has made a willful and material misrepresentation on his visa application and he was not legally eligible for a visa under the DPA. See 62 Stat. 1013.

K. Because Zajanckauskas was not eligible for a visa under the DPA, his admission into the United States in 1950 was unlawful.

L. Because Zajanckauskas was not lawfully admitted into the United States, his subsequent naturalization in 1956 was unlawful under 8 U.S.C. § 1427(a).

M. Accordingly, the defendant's citizenship must be revoked and his Certificate of Naturalization cancelled. Id. § 1451(a).

## ORDER

Judgment will enter for the plaintiff as follows:

1) the defendant's United States citizenship is revoked and the Order of the Superior Court of Massachusetts, sitting in Worcester, Massachusetts, dated June 15, 1956 admitting the defendant to citizenship is vacated. The defendant's Certificate of Naturalization, issued pursuant to that Order, is cancelled;

2) the defendant is permanently enjoined from claiming any rights, privileges, benefits or advantages under any document evidencing United States Citizenship; and

3) the defendant shall immediately surrender and deliver to the Attorney General his Certificate of Naturalization, his United States passport, should he have one, and any other indicia of United States citizenship.

**So ordered.**

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated January 26, 2005